IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-88

S&E CONTRACTORS, INC.,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

CITATIONS

Court Decisions:

Adminstrative Decisions:

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Petitioner requests that a writ of certiorari be issued to review the decision of the United States Court of Claims in this case (No. 104-67) which was entered on November 30, 1970.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, pp. A-1 to A-44) will be reported in 193 Ct. Cl. ___; 433 F.2d 1373 (1970). The report and conclusion of law of the commissioner of that court (App. B, *infra*, pp. B-1 to B-30) is unreported. The opinion of the Comptroller

General of the United States (App. C, *infra*, pp. C-1 to C-48)[1] is reported at 46 Decs. Comp. Gen. 441 (1966).

JURISDICTION

The opinion of the United States Court of Claims was entered on November 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).[2]

QUESTION PRESENTED

Whether the court below was correct in holding that, under the "Wunderlich" Act, 41 U.S.C. §321-22, the United States has a right—assertable by the General Acccunting Office or the Department of Justice or a contracting agency itself—to withhold payment on an

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[1] Appendix C contains only that section of the Comptroller General's opinion that is relevant to the question presented in this case.

[2] The opinion which the Petitioner seeks to have reviewed is not a final judgment granting or denying relief. However, that opinion does finally determine an important right in issue, namely, the right of the Government, in the absence of fraud or overreaching, to refuse to make payment to a contractor pursuant to an administratively final disputes clause decision and, by such refusal, force the matter into the Court of Claims for reexamination there under Wunderlich Act standards.

The jurisdictional statute (28 U.S.C. 1255) does not contain any requirement of finality, nor does such a limitation appear in this Court's applicable rules, (U.S. Sup. Ct. Rules 19-23). Further, this Court's jurisdiction to review interlocutory orders of the Court of Claims that finally determine the rights of the parties to a contract on issues other than liability has been recognized by the decisions in *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394 (1966) and *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966).

administratively final "disputes" determination in favor of a contractor (even though the contracting agency itself had earlier agreed to its finality and no fraud or overreaching is involved) in order to precipitate judicial review of the administrative determination by forcing the contractor to seek his payment in court.

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

The pertinent provisions of the statute and the contract involved are set forth in Appendix D, *infra*, pp. D-1 to D-2.

STATEMENT

1. *Background*—The "disputes clause" is a provision common to all Government contracts. Its purpose is to secure immediacy in the resolution of contract disputes and promptness in paying a contractor for any additional work which he may have been caused to perform and finance because of Government action. Petitioner in this case performed such additional work in 1961. In 1964, pursuant to an adversary proceeding under the disputes clause, it was established that Petitioner was entitled to be paid. The contracting agency ordered that immediate payment be made. However, the obligation remains unsatisfied to this day.

There are two reasons for this delay. First, the General Accounting Office claims that Congress, through the Wunderlich Act, 41 U.S.C. §321-22, has given it the right to conduct *ex parte* reviews of "disputes" decisions and to rewrite such decisions whenever it thinks the evidence weighs in favor of a different result. The GAO performed such a review and revision here. It took thirty-three months.

The second reason for the delay is that the Department of Justice believes that it too was given authority by Congress under that same Act to reexamine a "disputes" decision and to bar payment thereon whenever it thinks the facts favor a different result. The Department of Justice performed such a review here. Petitioner's "disputes" decision has been in litigation ever since. No question of fraud or overreaching was, or is involved, in the case. A fuller statement of the facts follows.

On August 4, 1961, the United States, acting through the Atomic Energy Commission (hereinafter also referred to as AEC or Commission), awarded Petitioner a competitively-bid construction contract in the amount of $1,272,000 for the building of a section of a nuclear testing facility at the National Reactor Test Station in the State of Idaho. The originally specified performance period was for 180 days. The contract was executed on U.S. Standard Form 23 (1953 ed.) including the standard general provisions, Form 23A, with the standard adjustment clauses for "changes", "changed conditions", "time extensions, etc." and additional general provisions containing a standard "suspension of work" clause. Further, the contract included a modified standard "disputes" clause (App. D, *infra*, p. D-1) which provided for the resolution of "any dispute concerning a question of fact arising under this contract" by the Contracting Officer subject to a timely appeal to the Atomic Energy Commission whose decision shall be final and conclusive "unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence."

The work was completed and the test facility was accepted by the Government on June 29, 1962, 325 days after issuance of the notice to proceed.

During performance of the work, Petitioner submitted a number of claims to the Contracting Officer asking for equitable adjustments in contract price and time. These claims were decided by the Contracting Officer on August 8, 1962. The decision was, in general, adverse to Petitioner. Accordingly, pursuant to the contract's disputes procedures, a notice of appeal from the decision was timely filed with the AEC. Certain additional claims, denied by the Contracting Officer on October 22, 1962, were consolidated with this appeal.

2. *Administrative Proceedings*

Nine distinct claims, seeking approximately $1,950,000, were presented to the Commission. In accordance with then existing AEC contract appeal procedures, the appeal was referred to a hearing examiner designated to hear grievances arising under the disputes provision and to render decisions thereon. A full adversary proceeding was had in the matter which took thirteen days to complete. The examiner's understanding of the case was facilitated by a visit to the jobsite, by a specially built model of the testing facility, which was placed in evidence with appropriate explanatory testimony, by extensive documentary support for each of the claims in issue, and by witnesses whose transcribed testimony amounted, in final form, to approximately two-thousand, eight hundred pages of trial transcript. On July 3, 1963, five months after the hearing ended, the examiner's decision was issued. Eight of Petitioner's claims were sustained.

Thereafter, by order of the examiner, the matter was remanded to the Contracting Officer for negotiation "without delay" of a final settlement in accordance with the outlines of liability that he had determined. However, contrary to this directive, the Contracting Officer

sought, and was granted, an opportunity to file out of time a petition for a full Commission review of the hearing examiner's decision. On November 14, 1963, the Commission issued a memorandum and order granting, in part, the Contracting Officer's request for review and also directing the immediate payment to Petitioner of certain earned sums which the Contracting Officer had retained.

On May 13, 1964, a final decision was handed down by the full Commission which modified the hearing examiner's decision on one claim, reversed it on another, affirmed the remaining claims, and remanded the matter to the Contracting Officer with instructions to diligently proceed to a final settlement of Petitioner's claims. With this last action by the Commission, the administrative remedies open to the contracting parties under the contract's disputes clause came to an end.

3. *Intervention of the General Accounting Office*

By letter dated March 6, 1964, a certifying officer of the AEC had sought advice from the General Accounting Office (hereinafter also referred to as GAO) as to whether there could be offset from the "retainage" due Petitioner certain monies then owing by S&E to its suppliers, the claims for which had been assigned to the Commission. This same letter also requested advice regarding that portion of the retainage which was said to represent damages due the Government resulting from its liability to a follow-on contractor because of a delay in site availability allegedly caused by S&E. In connection with this last mentioned request, it should be noted that the merits of the Government's right to withhold any sum on account of contractor-caused site delay had been conclusively settled by the hearing examiner's prior decision (he had found that S&E was not responsible for any

delay in performance). Moreover, neither this question nor any of its subsidiary elements was then the subject of the review pending before the Atomic Energy Commission. It was, in other words, a closed question at the time the GAO was asked to render its advice.

On December 5, 1966, thirty-three months after it had received the certifying officer's request for specific advice on the treatment of the retainage items, the GAO handed down a two hundred and sixty page opinion (App. C, *infra*, pp. C-1 to C-48)[3] which treated in detail with each of the various claims, and the evidence in support thereof, that had previously been decided by the hearing examiner and the AEC in favor of Petitioner. Based upon its *ex parte* review of the evidence, the GAO concluded that "the decision rendered by the Hearing Examiner on June 26, 1953, as reviewed by the Commission, fails to meet the requirements of the Wunderlich Act on material questions of fact and is erroneous on several material questions of law . . . ." (46 Decs. Comp. Gen. at 544) The GAO advised the Commission that S&E Contractors, Inc. had no valid claim against the Government, and on March 27, 1967, Petitioner was informed by the Commission that it would take no action in connection with the claims it had previously recognized which was inconsistent with the views that had been expressed by the General Accounting Office. Jurisdiction to intervene in the contractual disputes process was claimed by the GAO to have been "clearly conferred by the basic settlement and audit authority granted by the Budget and Accounting Act, 1921." (App. C, *infra* p. C-22)

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[3] Appendix C only contains that section of the GAO's opinion which is relevant to the jurisdictional question raised in this opinion. The full text of the opinion is reported at 46 Decs. Comp. Gen. 441 (1966).

4. *Proceedings in the Court of Claims*

Petitioner brought suit in the Court of Claims on April 11, 1967, pursuant to 28 U.S.C. § 1491. On September 29, 1969, the Commissioner of that court submitted a report recommending the allowance of S&E's motion for summary judgment based on the theory that the Commission's failure to have made payment to Petitioner in accordance with the entitlement established by the disputes clause proceedings was a breach of contract. (App. B, *infra*, pp. B-1 to B-30) In support of this result, the Commissioner relied on the language of the contract's disputes clause and the statement made by this Court in *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429 (1966) that respect should be accorded the parties' rights to contract and to provide for their own remedies. The GAO's actions in the matter were deemed by the Commissioner to have been in excess of its authority.

In subsequent proceedings before the Court of Claims, the Government took the position that the issue of the GAO's authority was totally irrelevant to any issue in the case. The only matter for consideration—from the Government's point of view—was its right to judicial review of administrative adjudications subject to the terms of the Wunderlich Act. And this right to seek such review was said to be a matter which the Department of Justice was free to decide for itself, independent of any prior GAO action, and notwithstanding any contractual commitment on the part of an executive agency to honor the finality of its decisions under the standard Government contract disputes clause.

An amicus curiae brief was filed by the GAO setting forth that office's views with respect to its jurisdiction to intercede in the contract disputes process. Its position was that the power exercised by it in this case derived

from its authority to audit and settle the accounts of executive officers. This it described as an executive function in the performance of which it was acting as a member of the executive branch. The point was made too that action of the type it had taken in this case was fully anticipated and intended by the Congress when it passed the Wunderlich Act. The GAO agreed, however, with the position taken by the Department of Justice, namely, that the question of the authority exercised by the GAO in this matter was totally irrelevant.

On November 30, 1970, the Court of Claims, by a 4-3 decision, upheld the Government's right to seek judicial review, based upon Wunderlich Act standards, of the contract disputes decision favorable to Petitioner. (App. A, *infra*, pp. A-1 to A-44) The court's majority was of the view that it made no difference whether the failure to pay a contractor resulted from a threat of the General Accounting Office to charge a certifying officer's account, (as occurred in this case), or "from a change of heart"[4] in the contracting agency itself. In either event, the Government was entitled to withhold payment and thereby force judicial review of the final disputes decision.

The dissenting opinion of Judge Skelton, with which Chief Judge Cowen and Judge Collins concurred, stressed the fact that, where as here, there had been no disavowal by the contracting agency of its own final disputes decision, the Department of Justice could not, on its own initiative, seek review of a settled contract matter. And, as to whether a contracting agency could,

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[4] This language is the court's own. The opinion below leaves open by whom, in the agency, the "change of heart" may be brought about.

in fact, seek review of its own administrative decision—have "a change of heart" as the majority put it—Judge Skelton felt that was a point not to be answered until the issue was squarely presented. With respect to the authority exercised by the General Accounting Office in this case, Judge Skelton, as well as Judge Collins in his separate dissenting opinion, disagreed with the majority's acceptance of the role played by the GAO. To all of the dissenters, the GAO's actions reached beyond that office's historically recognized statutory limits.

As a consequence of the Government's delay in payment in this case, the Petitioner has been unable to continue in business.

REASONS FOR GRANTING THE WRIT

In this case, the Court of Claims, in a sharply divided opinion, overruling its Commissioner, has announced a far-reaching rule governing the standard disputes clause contained in every Government contract that deprives administrative contract appeal board decisions in favor of a contractor of the finality such decisions have always been accorded. This rule is contrary to the language and history of the disputes clause and upsets the settled administrative practice upon which contractors, their suppliers, and financial institutions have long relied. Not since this Court's own decision in *United States* v. *Wunderlich*, 342 U.S. 98 (1951) has there been a court decision of more sweeping significance to the administrative disputes process pursued under Government contracts than the decision in this case.

As the court below stated it, the issue in the case was "whether the 'Wunderlich' Act, 41 U.S.C. §§321-22 [App. D, *infra*, p. D-1] . . . affords the Government a right to obtain judicial review—coextensive with that of

the contractor—of decisions of administrative tribunals unfavorable to it, on contract claims made in the course of the standard 'disputes' procedure . . . ." (App. A, *infra*, p. A-1 to A-2) To answer this question, the court looked to the legislative history of the Wunderlich Act and concluded that that history "albeit not explicitly, in general supports [a] construction" [that] "judicial review to whatever extent prescribed, seems extended equally and under like conditions to both contracting parties." (App. A, *infra* p. A-5) On the strength of this conclusion, the court decided that although an agreement to pay a contractor's claims had been reached administratively, the facts in support of that agreement—previously determined through a full adversary proceeding—were open to independent, *ex parte* challenge by the General Accounting Office, (as was the case here), could independently be reexamined and relitigated by the Department of Justice, or could be disavowed by the contracting agency that rendered the administrative determination. By virtue of the court's decision, each of these Governmental bodies may now bar payment of the contractor's favorable administrative determination, (even though, as in the instant case, no question of fraud or overreaching is involved), and, in that manner, precipitate judicial review by forcing the contractor to bring suit for payment in the Court of Claims.

The rule announced by the Court of Claims is without foundation in the legislative history of the Wunderlich Act, is not compelled by the text of that Act, has no support in relevant decisional law of this Court and is directly contrary to governing procurement regulations.

We submit that the rule announced in this case (1) destroys the integrity of the contract by permitting the Government to dishonor its promise of immediacy in the

resolution of disagreements in return for a contractor's commitment to proceed diligently, and at his own expense, in the performance of disputed work, (2) robs the disputes clause of its reason for being by discouraging contract settlements, by inviting long delays in payment, and by totally disrupting what has heretofore been an orderly process, (3) foments litigation by encouraging collateral attack and places a consequent unfair burden upon successful contractors to further litigate their claims and (4) imposes a needless and unwarranted burden upon administrative and judicial machinery.

Review by this Court is necessary to correct a situation which, if left as is, will severely impair the entire system of funding and financing of Government contracts—with attendent unwillingness (and financial inability) of contractors to undertake such work—and destroy the long acknowledged effectiveness of the disputes process. Neither contractors nor the Government agencies with whom they do business can live with a system where finality in contract matters is nowhere to be honored save in the courts.

1. The Text And Legislative History Of The Wunderlich Act Reject The Conclusion Of The Court Of Claims That Congress Intended That Act To Be Used As A Basis For Inviting Collateral Attack Upon Final Administrative Decisions Favorable To A Contractor

The purpose of the Wunderlich Act[5] was to restore to contractors their right of access to the courts in order

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[5] The text of the Act is set forth in Appendix D, *infra*, p. D-1.

to obtain judicial review of adverse administrative decisions. This remedial legislation had become necessary as a result of this Court's decision in the case of *United States* v. *Wunderlich*, 342 U.S. 98 (1951) where it was held that decisions of Government Officers rendered pursuant to the standard disputes clause in Government contracts were final absent fraud on the part of such officers. The second purpose of the Wunderlich Act was to prohibit the insertion in Government contracts of provisions making the decisions of Government officers final on questions of law arising under such contracts. In the case of *United States* v. *Moorman*, 338 U.S. 457 (1950) this Court had upheld the validity of such provisions on the ground that "no congressional enactment condemns their creation or enforcement." 338 U.S. at 460.

The chief reason given by the court below for its construction of the Wunderlich Act was that "Congress through the [Wunderlich] Hearings received a presentation emphasizing more the need for courts of competent jurisdiction to be open to both parties." (App. A, *infra*, p. A-8) This observation, we submit, is incorrect and irrelevant. The question is not what Congress was asked to do. The question is what it did do. And on this point, the legislative record is too certain to warrant statutory construction through conjecture: Attempts by the GAO to gain authorization to encroach upon the disputes process were universally opposed because of the uncertainty and disruption of that process that would thereby be created. Congress responded by passing legislation which made no mention of that office. Significant also to the issue in this case is the fact that no other Governmental agency, other than the GAO, sought authority to reexamine an administratively final decision in favor of a contractor. Hence, to hold, as the court below did, that the Wunderlich legislation should give a contracting

agency or the Department of Justice the authority to bar payment on a settled question of liability in order to precipitate judicial review is plainly without any legislative support whatsoever. Moreover, the court's view seems to completely ignore the fact that, in every case, it is always open to the United States to bring suit in a proper forum for the recovery of monies erroneously paid.

The Court of Claims seriously misreads the Wunderlich Act when it interprets that statute as dictating a requirement for judicial review of every final disputes decision favoring a contractor regardless of whether the Governmental action precipitating the contractor's suit was acting within its lawful bounds or not. We support our argument in part by a brief review of the legislative history.

Legislative History Of the Wunderlich Act

Shortly after the *Wunderlich* decision, bills were introduced in the 82d Congress to remedy the effect of that case. These bills, H.R 6214, H.R. 6301, H.R. 6338, H.R. 6404 and S. 2487, had a common feature—none mentioned the General Accounting Office. The Comptroller General of the United States voiced objection to this fact. His position was that, absent a provision in the bills providing for review of decisions of administrative officers by the General Accounting Office, that office would be precluded from questioning the legality of payments made to a contractor.[6]

In the 83rd Congress, new legislation was introduced. Two of these bills, S.24 and H.R. 1839, contained language responsive to the Comptroller General's

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[6] *Hearings Before A Subcommittee Of The Senate Committee On The Judiciary*, 82d Cong., 2d Sess. 7, 10, 118 (1952).

prior objections—the bills permitted the General Accounting Office to review disputes decisions on the same grounds allowed the courts. These two bills met strong objection from both Government and industry. The Department of Defense, for example, saw the reference to the General Accounting Office as causing difficulty to contractors particularly in regard to the bankability of their contracts.[7] Industry took exception on many grounds: the GAO would impair decisions of the several boards of contract appeal,[8] render the disputes clause a useless provision by dividing the responsibility for determining the merits of any given appeal and lead to protracted litigation between contractor and contracting agency.[9]

The views expressed in opposition to the GAO's inclusion in the proposed legislation led to the deletion of any reference to that office from S.24. This "substitute" bill, which became the Wunderlich Act, was acceptable to the GAO because, according to the Comptroller General, it would restore that office to the position it held prior to the *Moorman* and *Wunderlich* decisions.[10] The substitute was acceptable to industry because it deleted the earlier bill's grant of authority to the GAO to review administrative decisions under the disputes clause;[11] hence the GAO would not have authority to set aside administrative decisions on questions of fact

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7 *Hearings Before Subcommittee No. 1 of the House Committee On the Judiciary*, 82d Cong., 1st & 2d Sess. 54 (1953, 1954).

8 *Id.* at 105

9 *Id.* at 93

10 *Id.* at 136

11 *Id.* at 76

arising under a Government contract,[12] and the appellate procedures provided by the Government boards of contract appeal would not be disrupted.[13] One witness suggested that the GAO might still be able to rely upon the wording of the substitute bill and its legislative history to permit it to reverse an administrative decision for lack of substantial evidence. Congressman Willis, a member of the Committee, questioned how this could be possible, "... when GAO has been left out deliberately as compared to S.24?"[14]

The legislative history of the Wunderlich Act does not explain why the General Accounting Office was willing to abandon the position it had taken in regard to the Wunderlich legislation which was that, absent statutory coverage for the GAO in the new legislation, that office would be precluded from questioning decisions made under disputes provisions.[15] It is clear, however, that the effect of the substitute bill, as a recent Attorney General opinion has described it, "was to forego any legislative grant of jurisdiction to the GAO, while leaving it free to exercise, unchanged, whatever independent statutory authority it already had."[16] And concerning that authority, the history of the administrative evolution of

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12 *Id.* at 122

13 *Id.* at 105, 106

14 *Id.* at 110

15 *Hearings Before A Subcommittee Of The Senate Committee On The Judiciary*, 82d Cong., 2d Sess. 10(1952).

16 42 Ops. Att'y. Gen. No. 33 at 6 (1969).

the disputes clause lends persuasive support to the view that the GAO never regarded its authority to be so far-reaching as to encompass the right to question facts administratively resolved.[17]

Through its decision in this case, the Court of Claims has sanctioned an exercise of independent authority by the General Accounting Office (and by other Government arms as well) which, for all intents and purposes, permits that office to assert control over final disputes decisions in a manner precisely the same as would have been exercised had reference to the GAO been expressly included in the final Wunderlich legislation. It is obvious that such a result reduces the Wunderlich hearings and intent of Congress to a nullity, and makes the administrative disputes process the source of further litigation rather than the end of litigation. No matter how broadly one could draw the GAO's independent authority, the Wunderlich history clearly forces rejection of the principle that that authority could be used, as it was in this case, to accomplish an end result which contractors opposed, which Congress deliberately sought to avoid and which the Comptroller General himself stated would require express statutory authorization.

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[17] See Shedd, *Disputes and Appeals: The Armed Services Board Of Contract Appeals*, 29 Law & Contemp. Prob 39, 49 (1964) and Statement during Wunderlich Hearings of O.R. McGuire, former counsel to Comptroller General: "I do not believe he [*i.e.*, the Comptroller General] should review the facts and I do not believe that he claims that his office [*i.e.*, the GAO] should review the facts." *Hearings Before A Subcommittee Of The Senate Committee On The Judiciary*, 82d Cong., 2d Sess. 41 (1952).

At the beginning of the Wunderlich hearings, the Comptroller General warned that:

> It would be a serious mistake for the Congress to consider and enact legislation on 'finality clauses' in Government contracts without clarifying the jurisdictional lines between the administrative offices, the General Accounting Office and the courts under the Tucker Act.[18]

The decision in this case bears out the wisdom of that prophecy.

2. The Comptroller General's Authority to Intervene In The Administrative Disputes Process Requires Specific Statutory Authority Or A Right Given By Contract. In The Absence Of Such Rights, His Intervention Results In A Breach Of Contract.

In *United States* v. *Mason & Hanger Co.*, 260 U.S. 323 (1922), this Court dealt with a question involving the authority of the Comptroller of the Treasury (predecessor of the Comptroller General) over contract payments. The Court held that where the parties had, by contract, reserved to the contracting agency itself the right to make the final determination regarding costs chargeable to the contract, it was not open to the Comptroller to question the decision which the administrative officers had made. Although *Mason & Hanger*

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[18] *Hearings Before A Subcommittee Of The Senate Committee On The Judiciary*, 82d Cong., 2d Sess. 6 (1952).

predates the Wunderlich Act, nevertheless that decision bears directly upon the problem here involved.

In its brief to the Court in that case, the Government had argued that "neither a contracting officer nor any other officer of the Government could deprive the Comptroller of the Treasury of his statutory power and duty to see that no money was paid from the Treasury except such as the United States was legally bound to pay."[19] Also, it was contended that no contract could lawfully be made which would have such an effect. This Court decided otherwise. It said that the parties could contract to achieve finality and that, over payments made pursuant to such final decisions, "the Comptroller of the Treasury has no power." 160 U.S. at 326.

The Court, in its decision in *Mason & Hanger*, was guided by the principle that, when the United States enters into contract, it obtains rights and incurs responsibilities similar to those of the private individuals who are the parties to those contracts. One aspect of that principle—clearly demonstrated by the result in *Mason & Hanger* and of primary importance here—is that the powers of the Comptroller's office in regard to contract payments are such that they may be subordinated to other rights and obligations which an executive agency may lawfully create through contract.

And so, the exercise of those powers may be denied by the force of a contract provision (which was the case in *Mason & Hanger* where the contract made the Contracting Officer's decision final) or simply through the

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[19] Brief for United States, Petitioner, p. 17, No. 121, Oct. Term 1922, *United States v. Mason & Hanger Co.* 260 U.S. 323 (1922).

more fundamental proposition of contract law which denies a voice to one who is not a party to the agreement. Respect for the integrity of contract is the controlling principle.

Today, the Comptroller General claims the right to intercede in contract matters on the basis of the Wunderlich Act. Though it is clear that that Act does no more than restrict the degree of finality to be accorded to a final administrative decision in a court of law, the Comptroller General sees this Act as being sufficient to vest his office with authority over contract matters no less extensive than that of the courts and exercisable in every instance where a court itself might declare the rights of the parties on a matter properly brought before it.

We know of no decision of this Court that supports the Comptroller General in this unique view of the powers of his office. To the contrary, *Mason & Hanger* should have made the point clear that the power of the Comptroller General to exercise whatever authority he does possess depends entirely upon contract recognition being given to that authority. If this were not so—if his authority were exercisable notwithstanding the contract language (which was the very point the Government had argued in that case)—then the *Mason & Hanger* case would have been decided otherwise.

3. Governing Procurement Regulations Contradict The Court's Conclusion That The Heads Of Contracting Agencies May Disregard The Final Decisions Of Their Contract Appeal Boards.

In *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), this Court condemned administrative transgressions by

agency heads upon rights which they had granted through the promulgation of departmental regulations. By the decision below, such administrative transgressions are to be condoned. The Court of Claims has held, in this case, that the head of a contracting agency may disavow the final decision rendered by his cognizant contract appeal board. Governing procurement regulations do not allow such a result.[20]

In the case of the Armed Services Board of Contract Appeals and the General Services Administration Board of Contract Appeals, to which the court referred to in its opinion (App. A, *infra*, p. A-11), the regulations governing the adjudicatory functions of those bodies vest them with authority to decide disputes clause appeals as "fully and finally" as might each agency head, 32 C.F.R. §30.1 (1970); 41 C.F.R. §5.60.101 (1970); and such decisions shall "constitute decisions of the Head of the Department as referenced in the Disputes clause standard in all Government contracts." 32 C.F.R. §1.314(g) (1970).[21]

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[20] We should point out that in the present case no decision of a contract appeal board was involved. The final decision in this matter was by the AEC itself—a point to which the court's majority gave only scant attention. Nevertheless, discussion of the contract appeal boards is made necessary because of the broadness of the court's holding.

[21] While the Federal Procurement Regulations do not contain a like worded regulation, they do make clear that the GSBCA speaks with finality for the Administrator in all situations save those where he has specifically reserved the right to decide personally. 41 C.F.R. §5-60.101(b) and §5-50.220(b) (1970).

Not only do these regulations oppose the court in its view that agency head and agency board are not one and the same insofar as disputes decisions are concerned, but, beyond that, they compel rejection of the idea that an agency head is free to pick and choose those decisions he will honor and those he will not. Where an agency head has, by regulation, delegated final decision making authority in contract matters to another, and, has, in like manner, announced that such final decision shall also be his own, then he is no more free to disregard that commitment than the department head in *Vitarelli* v. *Seaton, supra.*

The fact that the *Vitarelli* case involved procedural rights whereas this case deals with contract rights is of no consequence. In either case the actions taken by an executive agency must be judged by its word. And so it would follow that even if the Court of Claims was correct in holding that a contracting agency had the potential right to avail itself of the benefit of judicial review under the Wunderlich Act (a point we do not at all agree with) that right would not be open to it when it has promised through regulation, and by contract, to make the decision of its contract appeal board its own final decision.

4. The Issue In This Case Has Not Been Decided By This Court Nor Has This Court Otherwise Spoken Plainly On The Issue

A last point we make concerns the statement by the court below that this Court, through language in its

opinion in *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394 (1966), recognized the Government's right to judicial review under the Wunderlich Act.[22]

The sufficient answer to this position by the Court of Claims is that the *Utah* case did not involve the far-reaching question presented here. That case dealt with a wholly unrelated issue and the statement there made by this Court was dicta. For the Court of Claims to rely on such authority is only to underscore the weakness of its conclusion.

But if answers on broad reaching questions are to find their support in dicta—as the Court of Claims seems to think—then we would point out that in *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966), (a case argued and decided on the same dates as *Utah*), this Court used language which recognized that the right to appeal adverse administrative action under the disputes provision was truly only a contractor's right. Speaking on the point of what a reviewing court should do when an

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[22] The language in question reads as follows:

> In the present case the Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. * * * 384 U.S. at 422

administrative record is defective or shows prejudicial error, this Court said:

> . . . there would undoubtedly be situations in which the court would be warranted, on the basis of the administrative record, in granting judgment for *the contractor* . . . . (emphasis added) 384 U.S. at 428

Clearly, by the above language, this Court recognized that appeals from the administrative machinery were contractor appeals.

CONCLUSION

This Court should review this case because the undermining of the Governmental "disputes" process and the potential for conflict between federal agencies, which the decision below makes possible, is a matter of substantial public importance and concern. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

In the United States Court of Claims

No. 104–67

(Decided November 30, 1970)

S & E CONTRACTORS, INC. v. THE UNITED STATES

Geoffrey Creyke, Jr., attorney of record for plaintiff. *John P. Wiese, Hudson and Creyke*, and *Locke, Parnell, Boren, Laney & Neeley*, of counsel.

James F. Merow, with whom was *Assistant Attorney General William D. Ruckelshaus*, for defendant. *Edward M. Jerum*, and *Vasil S. Vasiloff*, General Accounting Office, of counsel.

Robert F. Keller, Assistant Comptroller General of the United States, filed a brief for the General Accounting Office as amicus curiae. *Paul G. Dembling*, General Counsel, General Accounting Office, and *Vasil S. Vasiloff*, attorney, General Accounting Office, were with him on the brief.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

ON DEFENDANT'S REQUEST FOR REVIEW OF THE COMMISSIONER'S RECOMMENDED OPINION

NICHOLS, *Judge*, delivered the opinion of the court:

This is a contract case before us on defendant's request for review of our commissioner's recommended opinion. Stripped of subordinate and extraneous issues, the central question presented is whether the "Wunderlich" Act, 41 U.S.C. §§ 321–

22 (1964) (hereinafter referred to as the Act), affords the Government a right to obtain judicial review—coextensive with that of the contractor—of decisions of administrative tribunals unfavorable to it, on contract claims made in the course of the standard "disputes" procedure under the Wunderlich Act.

On August 4, 1961, plaintiff S & E Contractors, Inc. contracted with the Atomic Energy Commission (AEC) to build a testing facility at the National Reactor Test Station in Idaho. Performance of this contract generated numerous claims which the contractor properly filed with the contracting officer; those decided adversely to the contractor were seasonably appealed to the AEC. Since at this time the AEC did not have a contract appeals board to represent it, the contractor, under the AEC's then current procedures, was referred to a hearing examiner specially appointed to hear grievances and render findings of fact. Consequently, eight of plaintiff's claims were sustained by the hearing examiner and remanded to the contracting officer for negotiation and settlement on damage questions. Contrary to this directive, the contracting officer petitioned the AEC to review the hearing examiner's findings as to these eight claims. His petition was accepted and the AEC's review resulted in an affirmance of the hearing examiner's findings on seven of the eight claims. (The Government explains that the AEC did not actually affirm on these seven claims, but rather it merely declined to exercise its certiorari-like discretion to rehear them. This procedural clarification is of no real importance to our analysis, however, because the Government conceded at oral argument that the AEC's refusal to review these claims was itself sufficient to give the hearing examiner's findings administrative finality).

Again the matter was remanded to the contracting officer for final settlement. This time, however, settlement discussions were interrupted and finally terminated by the intervention of the General Accounting Office (GAO). Our commissioner found that an AEC certifying officer requested advice from the GAO with regard to the certification of a voucher for the making of payment on one of the successful claims. No mention was made nor was any advice solicited

concerning paying out on the remaining claims. Despite the narrowness of this request, the GAO advised the AEC in decision No. B–153841 (46 Comp. Gen. 441 (1966)) that payment on *any* of the disputed claims would be improper because the AEC's findings as to these claims were not supported by substantial evidence and were erroneous on matters of law. In view of this decision, the AEC informed plaintiff that plaintiff had "exhausted its administrative recourse to the Commission. * * * [and that] no action [would be taken by the Commission], in connection with the claims, inconsistent with the views expressed by the Comptroller General in * * * B–153841."

This information impelled plaintiff to bring suit in this court. Cross motions for summary judgment supported *only* by arguments and counter-arguments regarding the evidential substantiality and the legal correctness of the AEC's findings and conclusions were submitted to our trial commissioner. He, however, chose to disregard these arguments in favor of other theories. Essentially his opinion recommends that the AEC's failure to implement its own decision made under the contract's disputes provision (which he terms a repudiation) "must be regarded as a breach of that provision." Moreover, he suggests that the GAO intervention on substantiality and on legal grounds exceeded its authority and that therefore decision No. B–153481 "was too slender a reed * * * to support the Commission's repudiation of its own decision." The commissioner granted plaintiffs' motion for summary judgment, and rather than have the parties go back to the AEC for findings on quantum, he concluded that in view of the AEC's continuing refusal to pay plaintiff over a period of five years since its original decision, future relief there would be inadequate and unavailable. Hence, he recommends that plaintiffs' damages be fixed by this court under a Rule 131(c) proceeding. The points are ably made and the arguments are substantial, but we disagree.

The pervasive question running through this controversy is whether the Government has a right at all to seek judicial review based on Wunderlich Act standards where a tribunal of its own creation issues a contract disputes decision favorable to the contractor. Should this question be answered

affirmatively, we must also decide whether the Government's method of obtaining judicial relief in this case, simply by denying payment was proper.

Before tackling these provocative questions, we think it appropriate to define clearly the perimeters of our analysis. The factual background indicates that the Comptroller General effectively stopped payment of the claims. The Government, however, as represented by the Justice Department, which alone speaks for it in court, says that plaintiff would have been victorious by default in this court at the outset had Justice not decided to defend this suit. Specifically, it argues that this decision to defend was not prompted by any sort of requirement to give mandatory defense to opinions of the Comptroller General, but rather it was the uninfluenced product of the Justice Department's own thorough and independent review of the case. The Department considered the AEC's decision erroneous on matters of law and unsupported by substantial evidence in this case before us. Counsel for the Government therefore urges us to ignore the Comptroller's intervention as being the occasion but not the cause of the litigation and in no way itself an administrative decision having effect here or coming under our review.

We agree that the Comptroller's powers of decision and settlement, though great, may be assumed to lapse and fail at the Court House door. Therefore, it is not necessary for us to determine what decisions he might make or what finality they might have in cases not brought before us. When a Wunderlich Act case is pending here, the only question is how much finality attaches to the findings and holdings of the Board set up to execute the powers of the head of the agency in the premises. Really it makes no difference now whether the failure of defendant to pay out as the Board determined results, as here, from the Comptroller General's implied threat to charge the certifying officer's account, or from a change of heart in the agency itself, as was the case in *C. J. Langenfelder & Son, Inc.* v. *United States*, 169 Ct. Cl. 465, 341 F. 2d 600 (1965). We hold that in either event, a refusal by defendant to pay a Board award is not a breach of the disputes clause if the involved award is not supported by substantial evidence or otherwise is not entitled to finality under the Wunderlich Act. The reasons for this view follow.

The focus of our inquiry is the Wunderlich Act; the exact wording of the contract disputes clause in question has no bearing, at least as applied to the case before us. As we said in an earlier case, "it is the Wunderlich Act which is determinative. The minimal bounds of judicial review must be drawn from the terms, history, and policy of that Act, not from policies speculatively drawn from the contract clauses which are themselves governed by the statute." *C. J. Langenfelder & Son, Inc.* v. *United States*, 169 Ct. Cl. at 477 n. 7, 341 F. 2d at 607 n. 7 (1965).

Enacted in 1954 and unmodified thereafter, the Wunderlich Act reads as follows:

> § 321. LIMITATION ON PLEADING CONTRACT-PROVISIONS RELATING TO FINALITY; STANDARDS OF REVIEW
>
> No provision of *any* contract entered into by the United States, relating to the finality or conclusiveness of *any* decision of the head of *any* department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in *any* suit now filed or to be filed as limiting judicial review of *any* such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, That *any* such decision shall be final and conclusive unless the same is fradulent (sic) or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. (Emphasis supplied for word any).
>
> § 322. CONTRACT-PROVISIONS MAKING DECISIONS FINAL ON QUESTIONS OF LAW
>
> No Government contract shall contain a provision making final on a question of law the decision of *any* administrative official, representative, or board. (Emphasis supplied).

Strictly read the Act favors neither Government nor contractor: judicial review to whatever extent prescribed, seems extended equally and under like conditions to both contracting parties. The legislative history, albeit not explicitly, in general supports this construction. Both the House of Representatives and the Senate held full hearings on various bills introduced to undo the Supreme Court's de-

cisions in *United States* v. *Wunderlich*, 342 U.S. 98 (1951); and *United States* v. *Moorman*, 338 U.S. 457 (1950), making administrative disputes clause decisions final in the absence of fraud. (*Hearings on H.R. 1839, S. 24, H.R. 3634 and H.R. 6946. Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 82d Cong. 1st and 2d Sess., ser. 12 (1953–54)), (hereinafter referred to as the House Hearings); *Hearings on S. 2487 Before the Senate Subcomm. of the Comm. on the Judiciary*, 82d Cong., 2d Sess. (1952), (hereinafter referred to as the Senate Hearings). Spokesmen representing public and private interests presented contrasting views on the proposed legislation and the compass of its judicial review privileges. A sampling of their statements follows:

> And of course, the [Supreme Court's *Wunderlich*] rule works *both* ways. A deciding administrative official can make decisions adverse to the Government as well as to contractors, in which event an improper decision results in a burden, an improper burden, to the taxpayers * * *. The experience of the General Accounting Office has been that this is not an infrequent situation. * * *
>
> * * * * *
>
> * * *. The enactment of such a [curative] bill would preclude administrative officers from making final decisions in contract matters on questions of law, but would leave such final decisions for determination by the General Accounting Office and the courts.
>
> On the other hand, it would permit them to make determinations on questions of fact which would have final effect if the decisions were not found by the General Accounting Office or the courts to be fraudulent, arbitrary, capricious, et cetera. Such a law would not only protect a contractor from fraudulent, arbitrary or capricious action by giving him, in addition to resort to the courts, a further administrative remedy before the General Accounting Office, a time saving and less expensive proceeding, but it also would provide a protection, through the General Accounting Office, against decisions adverse to the interests of the United States. Certainly the rights of contractors and the Government to review or appeal should be *coextensive*.
>
> * * * * *
>
> Now, we feel, * * *, that this is a two-sided proposition. The interests of the contractors are clearly

> and undoubtedly involved. But likewise involved are the interests of the Government. I mean the *Government as a whole*, not just the Government as represented by one department or by one contracting officer.

Senate hearings, *supra*, at 9, 11, and 12, remarks of Frank L. Yates, Assistant Comptroller General of the United States. (Emphasis supplied).

* * * * *

> The position of the * * * [Associated General Contractors of America] is: We believe that *any* decision made by a contracting officer or head of a department, agency, or bureau, should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of *both* the contracting parties, and supported by the evidence upon which such decision was based. (Senate Hearings, *supra*, at 29, remarks of John C. Hayes, counsel for the Associated General Contractors of America). (Emphasis supplied).

* * * * *

> The essence of the legislative proposal now before this committee is that the contractor is to be given three reviews, that is one before a contracting officer, a second before the head of the department concerned, and a third before the Court of Claims, while the Government has but one [before the contracting officer]. Senate Hearings, *supra*, at 16, remarks of Bonnell Phillips, attorney Department of Justice. (This criticism was directed at the original proposal, not the draft subsequently enacted into law).

Specific citations to further testimony on this subject are as follows: Senate Hearings at 83–84, remarks of Gardiner Johnson, attorney at law; House Hearings at 4, remarks of Elwyn L. Simmons, President, J. L. Simmons Co., Contractors; *Id.* at 12, statement of Harry D. Ruddiman representing certain contractors; *Id.* at 19–20, remarks and letter of Alan Johnstone, attorney; *Id.* at 32–34, statement of the Honorable Edwin E. Willis (Representative, Louisiana) sponsor of H.R. 6946; *Id.* at 38–39, remarks of E. L. Fisher, General Counsel, General Accounting Office; *Id.* at 48, remarks of U. Bonnell Phillips, Assistant to the Assistant Attorney General, Civil Division, Department of Justice; *Id.* at 59, remarks of J. H. Macomber, Jr., Associate General Counsel,

General Services Administration; *Id.* at 109–11, remarks of Franklin M. Schultz; *Id.* at 140, letter of Lindsay C. Warren, Comptroller General of the United States; *Id.* at 138–139, letter of William P. Rogers, Deputy Attorney General of the United States; 99th Cong. Rec. 4573 (1953), remarks of Senator McCarran.

Plaintiff concedes that the recorded question and answer dialogue of the House and Senate Hearings "show Congressional awareness and intent that an administrative resolution of a contract dispute be amenable to review by both contracting parties", but it denies nevertheless "that the reviewing authority to be vested in the Government was to be anything other than the review function that had, in previous times, been exercised by the General Accounting Office." Simply, plaintiffs' "basic position" is that "under the Wunderlich Act, Congress contemplated that the GAO *alone* would be vested with the *limited* authority [over cases of fraud and gross error] to speak for the Government in respect to matters involving contract payment decisions." (Emphasis supplied). Contrarily, the Government argues that the qualified brand of judicial review afforded by the Wunderlich Act was intended to be equally available to both Government and contractor.

Although it has been accurately observed that the Act's legislative history "has something for everyone" (Kipps, *The Right of the Government to Have Judicial Review of a Board of Contract Appeals Decision Made Under the Disputes Clause*, 2 Pub. Contract L. J. 286, 295 (1969)), we are convinced that Congress through the Hearings received a presentation emphasizing more the need for courts of competent jurisdiction to be open to both parties. The committee reports resulting from these Hearings reflect adoption of this position. The Senate Report accompanying S. 24 (S. Rep. No. 82, 83d Cong., 1st Sess. (1953)), which reflects the Wunderlich Act as passed, subject to modification to clarify the Comptroller General's status and other matters, makes the following observation:

> It must also be borne in mind that to the same extent this decision [Wunderlich] would operate to the disadvantage of the *aggrieved contractor*, it would also operate to the disadvantage of the Government in those

cases, as sometimes happens, when the contracting officer makes a decision detrimental to the *Government* interest in the claim.

* * * * * *

S. 24 will have the effect of permitting review in [the General Accounting Office] or a court with respect to *any* decision of a contracting officer or head of an agency which is found to be fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by [reliable, probative,] and substantial evidence. In other words, in those instances where a contracting officer has made a mistaken decision, either wittingly or unwittingly, it will not be necessary for the *aggrieved party* to, in effect, charge him with being a fraud or a cheat in order to effect collection of what is rightfully due. (Emphasis supplied). [Bracketed language denotes corresponding language in S. 24 later deleted by pre-enactment amendment.]

Idential language to that quoted above can be found in Senate Report No. 1670, *supra*. Although the House Report (H.R. Rep. No. 1380, 83d Cong., 2nd Sess. (1954)) did not include similar language, it did make this statement:

After extensive hearings it has been concluded that it is neither to the interests of the *Government* nor to the interests of any of the industry groups that are engaged in the performance of Government contracts to repose in Government officials such unbridled power of finally determining either disputed questions of law or * * * fact arising under Government contracts, nor is the situation presently created by the Wunderlich decision consonant with the tradition that *everyone* should have his day in court and that contracts should be mutually enforceable. * * *. (Emphasis supplied).

Considering the plain language of the Act and the basic premises of equity surrounding its passage, we reaffirm our reasoning in *C. J. Langenfelder*, *supra*, and *Acme Process Co.* v. *United States*, 171 Ct. Cl. 251, 258–59, 347 F. 2d 538, 543–44 (1965), and hold that the Government has the right to the same extent as the contractor to seek judicial review of an unfavorable administrative decision on a contract claim.

Our commissioner ruled and plaintiff now argues that the AEC's "repudiation" of its own decision was a breach of the disputes clause thereby entitling the plaintiff to *automatic* summary judgment on appeal. We have already rejected

similar positions in *C. J. Langenfelder* and *Acme Process*, and for the reasons stated in those cases, plaintiffs' assertion must likewise fail. We recognize that these two cases tacitly condoned the Government's withholding technique—exercised to the fullest here—as a way of forcing suit in this court and obtaining "at the very least" judicial review on questions of law. The instant case, however, not only involves questions of law, but also questions of fact and those elusive abominations known as mixed questions of law and fact.

We do not perceive this to be a distinction substantial enough to cause different results. Neither the Act nor its history will sustain foreclosing the Government from judicial review on this basis. Divided into two sections, the Act precludes the attachment of finality to any administrative decision rendered on a question of law or issued as a result of fraud, caprice or arbitrariness or so grossly erroneous as to imply bad faith, or not supported by substantial evidence. The same equity which permits us to relieve the parties from legally erroneous decisions also dictates our intervention where factual determinations are fraught with any of the above deficiencies.

The Supreme Court's *United States* v. *Utah Constr. Co.*, 384 U.S. 394 (1966), anticipates our conclusion with approval. There the contractor under the disputes procedure brought two claims against the contracting agency, the Atomic Energy Commission. The "Pier Drilling" claim asked for an equitable adjustment of the contract price and a time extension under the contract's changed conditions clause. The second claim—denominated as the "Shield Window" claim—sought additional compensation and time for inadequate specifications and drawings supplied by the Government. Both claims alleged that the additional compensation was needed to balance losses incurred by the contractor consequent to Government-caused delays. The AEC's Contract Appeals Board made findings generally unfavorable to the contractor thus prompting suit in this court. We found the contractor's claims for delay damages to be breach of contract claims and as such ineligible for administrative consideration under the disputes procedure. We held, with one dissent, that the Board's findings on these claims were not final and that it was

appropriate for us to consider the factual circumstances *de novo*. The Supreme Court rejected this reasoning. The Court noticed that the Board's findings as to the causes of the contractor's delays were common to both the disputes claims for time extensions and the breach claims for damages. It held therefore that where a Board makes findings within the scope of its disputes authority, the presumed finality of these findings statutorily prescribed by the Wunderlich Act does not evaporate merely by changing the labels on the claims. Crucial to our case, however, is the concluding pronouncement made by the Court in *Utah* at 422:

> In the present case the Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the *factual* disputes resolved were clearly relevant to issues properly before it, and *both* parties had a full and fair opportunity to argue their version of the facts *and* an opportunity to seek court review of any adverse findings. * * *. (Emphasis supplied)

Hence the Court recognized the Government's right to judicial review of administrative factual determinations not meeting Wunderlich standards.

The trial commissioner's theory presupposes an identity between the Boards which adjudicate "Disputes Clause" cases and the directing heads of the agencies which make the contracts. When the Boards have spoken, the agencies have spoken, he thinks, and if they sustain the contractor, there is no dispute and nothing for the judicial power to operate on. It is true the differentiation is imperfect in the AEC procedure under review here, where the AEC itself is the final arbiter. But even so, the hearing examiner had no management functions. Under the Armed Services and GSA contracts, which generate the largest number of contract disputes, the Boards operate independently of the procurement authorities. The Armed Services Procurement Regulation establishes the Armed Services Board of Contract Appeals and authorizes it to decide appeals under the Disputes Clause of the contract, "as fully and finally as might each Secretary." 32 CFR § 30.1 (1962). The Federal Procurement Regulations contain similar provisions for the General Services Administration Board of Contract Appeals. 41 CFR § 5–60.101

(1963). The Secretary of Defense and the Administrator of GSA reserve to themselves no power of review or ratification of Board decisions. If one of them tried to tell a Board what to do in a pending case, he would commit a reprehensible *ex parte* approach. *Camero* v. *United States*, 179 Ct. Cl. 520, 375 F. 2d 777 (1967).

We think the Wunderlich Act and the Supreme Court decisions interpreting it, in attributing finality to the extent they do to decisions of these Boards, necessarily imply an expectation that the Boards, while in the nature of things not as independent as Article III courts, will enjoy a degree of independence approaching and comparable to that of the various independent quasi-judicial and regulatory boards and commissions which, too, can make binding fact findings. *E.g.* National Labor Relations Board, 29 U.S.C. § 153 (1947); Securities Exchange Commission, 15 U.S.C. § 78d (1934); Federal Communications Commission, 47 U.S.C. § 151 (1934); Civil Aeronautics Board, 49 U.S.C. § 1321, (1958); Interstate Commerce Commission, 49 U.S.C. § 11 (1935). Having achieved this, it would be inconsistent and unfair for the law to turn around and pretend that the Board and the Secretary were the same. The Supreme Court characterized a disputes clause as an agreement "for the settlement of disputes in an arbitral manner", in the *Wunderlich* case, *supra*, 342 U.S. at 100. Appeals Boards of course, like the rest of us, sometimes err, but we see scant reason to believe they think of themselves as closer to one party than the other. To do so would demean the high standards they are sworn to as members of the bar. The Armed Services Board must consist of qualified attorneys admitted to the bar. 32 CFR § 30.1. The GSA Board includes at least three lawyers of whom each panel must include one or more. 41 CFR § 5–60.102. These requirements imply not only standards of education and training but also standards of ethics. From lawyer members, we believe, the public has a right to expect conformity to Canon 13 of the Canons of Judicial Ethics when they are acting in what the Supreme Court *quot supra*, calls a "judicial capacity." Canons 17, 24 and 29 also have special application to lawyer members of Contract Appeals Boards.

We think, in the existing circumstances, a Board power to extinguish a case or controversy merely by agreeing with the contractor is inconsistent with true independence. If, *e.g.*, the Secretary of Defense has established a Board that binds him as fully as he could bind himself, even as to legal conclusions and even in case of an arbitrary or capricious Board decision, he has created a Frankenstein monster. The temptation either to appoint persons to the Board who would be subservient to management wishes, or to make improper *ex parte* approaches, would be near to impossible to resist. Within the four walls of an executive establishment, the real independence of a Board would be suspect, the facts as to this would be difficult to come by, and contractors could never be sure they were getting from disputes clause procedures what they had contracted for. On the other hand, if the Secretary has the right to seek review within Wunderlich Act limitations, there is a safety valve and Boards can call cases as they see them without so much pressure building up. It would seem therefore, that even an egomaniac Board member would not desire the powers it is asserted on his behalf he possesses. Most of us have enjoyed the blessed relief of saying: "If you don't like my decision, the courts are open!"

In the administration of revenue laws, the differentiation between administration and adjudication is often not spelled out. The result is the rule of selecting among possible interpretations of law, the one that appears likely to raise the most tax. This rule has a name, the "Protect the Revenue" principle, under which it is heresy to abandon an arguable nonfrivolous line of legal reasoning on the mere ground that another line, generating less revenue, appears to be right. Abandonment of the most favorable line to the Government would normally not be reviewed by a court, and would be final, while insistence on it produces judicial review, and this is the controlling reason why the administrator-adjudicator is apt to prefer the latter. From these observed facts it seems clear that decisions of a truly impartial and independent tribunal should always be equally reviewable, for whomsoever it decides. Breach of this principle is a prime cause of slanted decisions.

It is true, as we have already noted, that the AEC had not delegated its disputes clause powers to an independent Board. In this, however, the situation was somewhat unusual. We think we are justified in analyzing the position of the congress and the Supreme Court in light of their knowledge that delegation to an independent Board was then common and doubtless would remain so. Since the Wunderlich Act, the head of an agency would appear to be acting in a judicial capacity when he reserves to himself the adjudication of a claim under disputes clause procedure. He has for the nonce set his managerial responsibilities aside and put on another hat. Otherwise he would not be entitled to claim Wunderlich Act finality for his decision against a contractor's attack. The employment, as in this case, of a hearing examiner facilitates this differentiation of roles, and makes it more than a sham. Despite the emphasis of one of our dissenters on the absence of an independent Board in this case to execute the powers here involved, no reason is offered why legal consequences should flow from the distinction, and it would appear there are none. If we held that the AEC's action obliterated the dispute, we would have to hold that the decision of a Board it created would do the same.

We are assured on behalf of defendant that the GAO has in the past but sparingly tripped up the implementation of a Board decision favorable to a contractor, by means of threatening to charge a certifying officer's account, or otherwise. We are asked to infer it will exercise like self-restraint in the future. If so, the effect of our decision will not be to encumber further the already deplorably slow and rocky road to the final adjudication of Government contract disputes under the Wunderlich Act. If not, this would be for the further attention of Congress rather than warranting us in frustrating its evident purpose as to the full mutual availability of judicial review under the statutory standards. As long as procedures remain as they are, there is need for special diligence on the part of all concerned to keep cases moving along and to avoid multiplication of needless technical maneuvers.

In view of the foregoing, we remand the case to the commissioner for his consideration and report on the various claims under Wunderlich Act standards.

SKELTON, *Judge*, dissenting:

This court should not consider nor act on the alleged "appeal" filed by the Attorney General in this case for the reasons set forth below.

There is no Controversy Between the Plaintiff and the Atomic Energy Commission on the Facts or the Law in This Case

It is elementary that a court will not consider a case unless there is a controversy between the parties on the facts or on the law, or both. No such controversy exists here. The contract was made between the plaintiff and the Atomic Energy Commission (AEC). They included the standard "disputes" clause in the agreement which established the procedure for presenting, considering, appealing, and settling claims and disputes. During the performance of the contract, disputes did occur and plaintiff presented the claims involved here to the contracting officer, who rejected them. The plaintiff duly appealed to the AEC, who referred the claims to an examiner. The examiner heard the evidence and handed down his decision. The contracting officer appealed from the examiner's decision to the AEC, who modified the examiner's decision and eventually issued its own decision and opinion. All of this was done in strict accordance with the disputes clause and the agreement of the parties. The plaintiff has accepted the decision of the AEC and is agreeable to the disposition of its claims in the manner set forth in such decision. Under these circumstances, one may logically ask the question, where is the controversy? Clearly there is none.

The only complaint the plaintiff has is the fact that it has not been paid and its claims have not been disposed of in accordance with the decision of the AEC to which it has agreed. In effect, the parties to the contract have settled their differences to the extent they are covered by the AEC decision.[1] In a sense, the situation of the parties here could be likened to that of litigants whose disagreements have become a stated account. Of course, this court has jurisdiction to entertain plaintiff's claim because it has not been paid as provided in the AEC decision.

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[1] The AEC decision, for the most part, determined the liability of the government to the plaintiff, leaving the amount plaintiff is to receive to be determined later by the contracting officer, subject to plaintiff's right to appeal as provided in the disputes clause.

On the other hand, the AEC has no claim, and, therefore, no right of appeal in this case. Actually, it has not asserted any claim nor any right of appeal here. As far as the record shows, it handed down a decision and was willing to carry it out and would have done so had it not been for the unjustified and completely unauthorized interference by the General Accounting Office (GAO), which will be discussed in more detail below, and the attempt by the Department of Justice to substitute its opinion for the decision of the AEC. In fact, were it not for the action of the GAO and the Department of Justice, the AEC would be willing to implement its decision at the present time, because there is nothing in the record that indicates it would not do so. As shown below, the Attorney General agrees that the AEC's decision has not been changed and the AEC would be willing to enforce it.

The AEC is the government as far as plaintiff's contract is concerned. It is the only party to the contract besides the plaintiff. The GAO did not sign the agreement and is not a party to this suit. The same is true with respect to the Department of Justice, who appears here only as the attorney for the AEC.[2] The AEC has no claim and asserts none.

The AEC Has not Reversed, Modified, Cancelled, Set Aside, or Changed Its Decision in Any Way.

Another compelling reason why we should not consider the appeal filed by the Department of Justice is the fact that the AEC never at any time reversed, modified, cancelled, set aside, or changed its final decision between the time it was issued on May 13, 1964, and the date this suit was filed on April 11, 1967, or thereafter.

It will be noted that the concluding paragraph of the final order of the AEC of May 13, 1964, provided:

> The proceeding is remanded to the contracting officer with instructions to proceed to final settlement or decision in accordance with the decision of the hearing examiner dated June 26, 1963, as modified by our order of November 14, 1963, and by this decision.

[2] This will be discussed more fully below.

United States Atomic Energy Commission
/s/ Glenn T. Seborg
Chairman Glenn T. Seborg
/s/ John G. Palfrey
Commissioner John G. Palfrey
/s/ James T. Ramey
Commissioner James T. Ramey
/s/ Gerald F. Tape
Commissioner Gerald F. Tape
/s/ W. B. McCool
W. B. McCool, Secretary[3]

This decision has never been reversed or changed in any way. The only act of the AEC after this decision was handed down was the writing of a letter dated March 27, 1967, by B. E. Hollingsworth, General Manager of the AEC, to the attorneys for the plaintiff, which stated:

* * * * *

> The Atomic Energy Commission's view is that S&E Contractors, Inc. has exhausted its administrative recourse to the Commission. The Commission will take no action, in connection with the claims, inconsistent with the views expressed by the Comptroller General in his opinion of December 5, 1966—B-153841.
>
> Sincerely yours,
>
> B. E. Hollingsworth
> *General Manager*[4]

This letter, although signed by the AEC's general manager, is not the official action of the AEC, but only the manager's opinion as to the view of the AEC. But even if it could be said to be the action of the AEC, it does not in any way reverse or modify the final decision of the AEC of May 13, 1964. It informs the plaintiff that it has exhausted its administrative recourse to the Commission. This is but another way of telling the plaintiff that the decision of the AEC is final and there is nothing more that plaintiff needs to do with the AEC. When the AEC said in the above letter

[3] Before the United States Atomic Energy Commission, In the matter of S. & E. Contractors, Inc. Under Contract No. AT (30-3) 790 Docket Nos. CA-161 and CA-162, Decision of May 13, 1964, pp. 14-15. For the sake of brevity, the complete decisions are not reproduced here.

[4] Exhibit A, page 8, plaintiff's petition.

that it would take no action in connection with the claims inconsistent with the GAO's opinion, it was simply saying that as far as it was concerned its decision of May 13, 1964, was final and it did not intend to do anything further with respect to it or the claims involved. Actually, it has not done anything further, and its decision of May 13, 1964, still stands.

As a matter of fact, the Attorney General has agreed that the AEC has not repudiated its decision and will promptly proceed to implement it if this court so orders. This is shown in Defendant's Request for Review of the Commissioner's Recommended Opinion filed herein on November 21, 1969, where the following statement appears:

> * * * *To our knowledge to date* [*November 21, 1969*] *the Commission* [*AEC*] *has not repudiated the decisions involved in this matter* and, in fact, plaintiff is relying on the purported finality of the decisions involved in this litigation. *Should the Court rule adversely to our assertions on the merits of the finality issues, then the Commission will promptly proceed to implement the decisions.* * * * [*Id.* at n. 4.] [Emphasis supplied.]

This is an unqualified admission that the AEC decision has not been reversed or changed in any way, but is still in force. Under these circumstances, there is no claim of the AEC (the government) before the court in this case. A further admission by the Attorney General along this line is found on page 8 of Defendant's Reply to Plaintiff's Response to Defendant's Request for Review of the Commissioner's Recommended Opinion, where it is stated:

> * * * If we are not successful in establishing that the disputes *decisions* lack finality, obviously upon a final judicial ruling to that effect, *they would be promptly implemented.* [Emphasis supplied.]

There is no Need to Reach the Question of Whether an Executive Agency can appeal from a Board's Adverse Decision, as There is no such Agency Appeal nor a Board's Decision In this Case

The decision of the majority that an executive agency can appeal to this court from a Board's adverse decision is wide of the mark and must be considered as pure dicta, because

there is no appeal by an agency from a Board's decision in this case.

The majority approaches the problem as if the AEC, an executive agency, was appealing from an adverse decision of an independent or quasi-independent Board. That is not the situation at all. In fact, no Board of any kind is involved. At the time this case arose, the AEC did not have a Board to hear appeals under the disputes clause. When the plaintiff appealed from the decision of the contracting officer, he appealed directly to the AEC. Since the AEC did not have an appeals board, it referred the appeal to a hearing examiner, who heard the case and rendered a decision on June 26, 1963. The contracting officer appealed to the AEC from this decision and the AEC modified it somewhat in its decision of November 14, 1963. The contracting officer was still not satisfied and asked for a rehearing. The AEC granted the rehearing and again modified the decision by its final decision of May 13, 1964. So, in this case, we do not have a board decision at all, but on the other hand we have not only one decision but two decisions of the AEC itself, both of which were rendered after the examiner had handed down his decision. Under these facts, it is erroneous to hold that there is an appeal by the AEC, the executive agency involved, from an adverse Board decision.

It is true that the majority opinion recognizes that the decision in this case was made by the AEC itself and not by a Board. But after acknowledging this fact, it is put aside and is ignored as far as the ultimate decision is concerned. Many pages of the opinion are devoted to a discussion of the independence, honesty and quasi-judicial character of administrative Boards, and why the "government" should be allowed to appeal from their adverse decisions (without saying who is the government or who in the government can appeal (through the Attorney General as attorney and spokesman)). The following excerpts from the opinion clearly indicate that it is based on the erroneous premise that the appeal in this case is by an executive agency from an adverse decision of a Board:

> * * * [T]he central question presented is whether the Wunderlich Act * * * affords the Government a right

to obtain judicial review * * * of decisions of *administrative tribunals* unfavorable to it * * *. [Emphasis supplied.]

The pervasive question running through this controversy is whether the Government has a right at all to seek judicial review based on Wunderlich Act standards where *a tribunal of its own creation* issues a contract disputes decision favorable to the contractor.[8] [Emphasis supplied.]

When a Wunderlich Act case is pending here, the only question is how much finality attaches to the findings and holdings of *the Board set up to execute the powers of the head of the agency in the premises.* [Emphasis supplied.]

Really it makes no difference now whether the failure of defendant to pay out *as the Board determined* * * *. [Emphasis supplied.]

We hold that * * * a refusal by defendant to pay a *Board award* is not a breach of a disputes clause if * * *. [Emphasis supplied.]

The majority opinion then discusses Armed Services and GSA *Board* and their independence from review by the Secretary and Administrator, respectively (as if that were the situation here), saying:

Under the Armed Services and GSA contracts * * * the *Boards* operate independently of the procurement authorities. * * *. The Secretary of Defense and the administrator of GSA reserve to themselves no power of review or ratification of *Board decisions.* [Emphasis supplied.]

We think the Wunderlich Act and the Supreme Court decisions interpreting it, in attributing finality to the extent they do to decisions of these *Boards, necessarily* imply an expectation that the *Boards* * * * will enjoy a degree of independence approaching and comparable to that of the various quasi-judicial boards and commissions in the Executive Branch, *which, too, can make binding fact findings. e.g.*, National Labor Relations Board [etc.]. * * * *Having achieved this, it would be inconsistent and unfair for the law to turn around and pretend that the Board and the Secretary are the same.* [Emphasis supplied.]

[8] I interpret the words "administrative tribunals" and "a tribunal of its own creation" to mean and refer to Boards and not to the executive agency itself.

> We think, in the existing circumstances, a *Board* power to extinguish a case or controversy by agreeing with the contractor is inconsistent with true independence. If, *e.g.*, the Secretary of Defense has established a *Board* that binds him as fully as he could bind himself, even as to legal conclusions and even in case of an arbitary or capricious *Board decision*, he has created a Frankenstein monster. * * * Within the four walls of an executive establishment, *the real independence of a Board would be suspect* * * *. [Emphasis supplied.]
>
> * * * On the other hand, *if the Secretary has the right to seek review* within Wunderlich Act limitations, there is a safety valve and *Boards* can call cases as they see them without so much pressure building up.[6] [Emphasis supplied.]

The real basis of the majority opinion is shown by the following statement:

> From these observed facts it seems clear that decisions of a *truly impartial and independent tribunal* should always be equally reviewable, for whomsoever it decides. [Emphasis supplied.]

A reading of the above excerpts from the majority opinion makes it inescapably plain and clear that the opinion is based on the erroneous belief that in this case we have an appeal by an executive agency from an adverse decision of an independent tribunal or Board. These are just simply not the facts. It appears that the majority has attempted to decide a question that is not involved here.

The majority cites the cases of *C. J. Langenfelder & Son, Inc.* v. *United States*, 169 Ct. Cl. 465, 341 F. 2d 600 (1965) and *Acme Process Co.* v. *United States*, 171 Ct. Cl. 251, 347 F. 2d 538 (1965) in support of its decision. These cases are distinguishable on the facts and issues from the case before us. In the *Acme* case there was a Board decision, but there is none here. In *Langenfelder* the agency repudiated its decision and attempted to reopen the hearing in order to reverse it, which is not the case here.

Should it appear that those cases in any way conflict with the opinions herein expressed, to that extent I would overrule them.

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[6] No Secretary has sought review and there is no independent Board decision in our case.

The majority opinion is deficient in at least two vital respects, namely, (1) There is no appeal *by the AEC* (the concerned agency) from a Board decision nor from its own decision, and (2) There is no Board decision from which the AEC or any other agency could appeal.

The Attorney General has attempted to equate the decision of the AEC's hearing examiner to that of a Board. But this falls short of the mark. The agency's examiner and a Board are not the same. Their decisions are not the same. Furthermore, the AEC took the controversy out of the hands of its examiner and rendered two decisions itself thereafter. These are the decisions involved here.

The Action of the GAO Was Unauthorized and Beyond the Scope of Its Authority.

The GAO has an auditing function and is without authority to overturn the decision of a contracting officer, a Board or an executive agency, in contract cases involving the standard disputes clause, in the absence of fraud or overreaching. See *James Graham Mfg. Co.* v. *United States*, 91 F. Supp. 715 (N.D. Cal. S.D. 1950). Our able Trial Commissioner, Mastin G. White, found that there was no fraud or overreaching in this case. Therefore, when the GAO handed down a decision that plaintiff's claims were invalid and that the decision of the AEC favorable to the plaintiff on such claims was not supported by substantial evidence and was erroneous on matters of law, it purported to act as a reviewing court—a self-appointed court of claims—completely beyond its authority.

In addition to the foregoing, the action of the GAO on the claims involved in the case before us was completely unauthorized because such claims were never presented to it even for audit. The facts reveal that a certifying officer of the AEC asked the advice of the GAO with respect to the certification of a voucher in the sum of $32,297.73 payable to the plaintiff under the contract. This voucher consisted of three items, namely $22,280 withheld from plaintiff because it allegedly owed such amount to a supplier of aggregate, $8,366.19 withheld because of the government's possible liability to another contractor, and $1,651.54 withheld because of a possible liability by the plaintiff to another con-

tractor for telephone services. Our trial commissioner found that these amounts and this voucher did not include any proposed payment to the plaintiff on any of the seven claims that are under consideration in this case, namely, the "access", "concrete", "steam", "weather", "acceleration" and "backfill" claims. The Attorney General disputes this finding and says that at least one of the items in the voucher was related to delay damages for time extensions in the performance of the contract. The findings of the Commissioner are presumed to be correct, but even if he was mistaken in this respect, the action of the GAO was still unauthorized. It proceeded to review these seven claims in their entirety, the quantum of most of which had not (and has not) been determined, even though the claims had not been submitted to it for audit, and then issued an opinion regarding the invalidity of the AEC's entire decision, as aforesaid. It is clear that in taking this action, the GAO went out of its way to perform a review function which was not within its authority either by statute or by the terms of the contract.

The GAO now says by its amicus curiae brief filed herein that its action is not binding on the plaintiff and that its decision "did not, and could not, affect the ultimate substantive rights of the plaintiff" (Page 15), citing *Iran National Airlines Corp* v. *United States*, 175 Ct. Cl. 504, 508, 360 F. 2d 640 (1966) and *St. Louis B. & M. Ry.* v. *United States*, 268 U.S. 169, 174 (1925). This is of small consolation to the plaintiff after it has been "run over by the GAO steamroller" and forced into insolvency and out of business. His position is somewhat like that of an injured pedestrian who is told by a truck driver that he thought his truck had the right of way when it ran over him, and, anyway, he may recover from his injuries and he should just go away and forget it.

The Department of Justice takes more or less the same position, saying that the action taken by the GAO is "irrelevant", is not in issue, and is not being relied on. It is obvious that the Attorney General would find it very difficult if not impossible to sustain the acts of the GAO as being within the scope of its authority and binding upon the plaintiff.

I would not belabor the GAO issue were it not for the fact

that the majority opinion seems to give tacit approval to what the GAO did here by saying:

> We are assured on behalf of defendant that the GAO has in the past but sparingly tripped up the implementation of a Board decision favorable to a contractor by means of threatening to charge a certifying officer's account, or otherwise. We are asked to infer it will exercise like self-restraint in the future.

I am afraid that the majority is expressing a forlorn hope and is indulging in wishful thinking. This hope and thinking could turn to chagrin and dismay if the GAO, under the authority of the majority decision in this case, makes a regular practice of overturning administrative decisions favorable to contractors as it did here. In that case, the Frankenstein mentioned by the majority in another part of its opinion will have been created by us. The result will be disastrous to contractors and very hurtful to the government as well. I do not think we should approve, even by implication, what the GAO did here, but should flatly repudiate it.

The AEC Is The Government In This Case, and The Attorney General Is Without Authority To Revise, Modify or Overturn Its Decision.

The Attorney General claims to be "the government" in this case. He says on page 6 of Defendant's Reply to Plaintiff's Response to Defendant's Request For Review of The Commissioner's Recommended Opinion:

> • • • In this Court, the Government is, for all intents and purposes, the Department of Justice, 28 U.S.C. §§ 516, 519 (1966 Supp.).

In this statement, and otherwise, he implies that he and his Department have the power and authority to review a decision of another executive agency and to overrule it and substitute his own opinion for it on questions of fact and of law, of mixed fact and law, policy, discretion, expediency, exigency, propriety and executive agency judgment. I do not agree. Such reasoning would indeed make his department a super reviewing agency without whose approval no other executive agency or department could do anything with finality. He cites 28 U.S.C. §§ 516, 519 (1966 Supp.) and

Federal Trade Commission v. *Guignon*, 390 F. 2d 323 (8th Cir. 1968) in support of this proposition. A reading of these authorities does not support his theory. The two cited statutes merely provide that when the United States or an agency or officer thereof is involved in litigation, he shall be the attorney and counsel in a representative capacity to conduct the litigation. In other words, he is supposed to act as any attorney would act in representing his client. These statutes in no way authorize him to review and overrule what another executive agency has already decided on matters peculiarly within its jurisdiction and substitute his own opinion and decision therefor.

The Federal Trade Commission case, *supra*, does not support the theory of the Attorney General. There the Federal Trade Commission sought to enforce subpoenas issued by it by using its own attorneys to make application in court for such enforcement. The Attorney General took the position that the Commission could not *represent* itself in court but must have the application for enforcement made by the Attorney General "*at the request of the Commission*". The court upheld the contention of the Attorney General. It is clear that the issue there was whether the Commission could use its own lawyers or must use the Attorney General to make the application. This was a matter of who was to appear in court as the attorney for the Commission—a question of representation—not one of substituting the Attorney General's opinion or decision for that of the Commission on facts, policy or discretion, or any other matter within the jurisdiction of the Commission. It is significant, too, that the court indicated that the Attorney General should be requested by the Commission to represent it in court. (In our case there is no showing that the AEC ever requested the Attorney General to try to overturn its decision in this court, nor to modify it in any way.)

This court held in *Campell* v. *United States*, 19 Ct. Cl. 426, 429 (1884) that the authority of the Attorney General to conduct suits in the Court of Claims on behalf of the government "may fairly be held to include, at least, every act in the conduct of such suits, which an attorney at law, in a suit between individuals, might lawfully do." In other

words, his position and authority is that of an attorney representing his client. We need go no further than the opinion of the Attorney General himself to support this proposition. He said in 7 Op. Att'y Gen. 577 (1855):

> The relation of the Attorney General to any one of the Excutive Departments * * * is that of counsel to client, namely, to give advice as to the legal right, and instruct procedure, *if desired*, leaving all considerations of administrative exigency or expediency to the decision of the proper Department. [Emphasis supplied.] [*Id.* at 577].

The Attorney General himself has repeatedly ruled that he has no authority to review or overturn decisions of other executive agencies upon questions of fact, of mixed fact and law, policy, discretion, expediency or other matters peculiarly within the jurisdiction of such agencies. I quote only a few of these opinions as follows:

> * * * It is not within the scope of my authority to reverse this decision of the [Civil Service] Commission or to require it to issue the certificate of reinstatement [of a discharged employee.]
>
> No statute is found which authorizes the Attorney General to reverse or review this action of the Commission * * *. [20 Op. Att'y Gen. 270, 272 (1891).]
>
> * * * The Attorney General has no control over the action of the head of the Department [Secretary of the Interior], nor could he with propriety express any judgment concerning the *disposition* of the matter * * * that being something wholly within the administrative sphere and direction of such head of Department. [17 Op. Att'y Gen. 332, 333 (1882).]
>
> This substantially asks me to exercise appellate jurisdiction over a decision upon mixed questions of fact and law. This I am not empowered to do. [Directed to the Secretary of the Interior.] [20 Op. Att'y Gen. 711, 713 (1894).]
>
> * * * I am not authorized to express any views upon a matter of propriety lying within your [Secretary of the Treasury] own executive judgment and discretion * * *. [25 Op. Att'y Gen. 93, 96 (1903).]
>
> Finally, it is not within my province to construe the reasons affecting his administrative judgment and discretion, which might impel the head of a Department to take any action one way or the other in a matter pending before him for decision * * *. I am neither em-

powered nor required to pass upon the propriety of the exercise by the Secretary of the Interior of his official discretion. [25 Op. Att'y Gen. 524, 529 (1905).]

It appears * * * that I am not called upon to give an opinion upon a question of law now pending and undetermined in the Veteran's Administration but am asked to give an opinion upon a question which you have already considered and decided. It has been held by my predecessors that this Department possesses no jurisdiction under the law to revise a conclusion already reached * * *. (20 Op. Att'y Gen. 440). [38 Op. Att'y Gen. 149, 150 (1934).]

Mr. Bates says (10 Opin., 267): 'I have no power to investigate or decide on facts * * *.'

* * * I am not at Liberty to submit * * * an official opinion * * * upon the questions that have been decided * * *. [20 Op. Att'y Gen. 440, 444, 445 (1892).]

Not only must the question arise in the administration of a department, but it must be still pending and undecided. A matter which has been considered and decided by a department is not a 'question' upon which the Attorney General renders an opinion. (20 Op. 440). As Attorney General Butler (3 Op. 39) said, in declining to render an opinion upon a question which had been decided by the department making the request: 'I cannot undertake to give an official opinion on the question proposed to me, without assuming that this office possesses a revisory jurisdiction not conferred upon it by law.' [39 Op. Att'y Gen. 67, 68 (1937).]

The last word of the Attorney General on this subject was expressed in his opinion of January 16, 1969, in which he said:

I understand the concern of GAO that its *review of contract appeals board decisions* is necessary to enable the Government to obtain judicial review of an adverse board decision. See 46 Comp. Gen. 441, 458 (1966). In my opinion, however, GAO review is not the only means to accomplish this purpose. *The contracting agency*, acting through the Department of Justice as the Government's counsel in claims litigation, *is also able to obtain such review on its own initiative.* * * *

* * * *The contracting agencies* should call to this Department's attention, on a continuing basis, *appeals board decisions* against the Government which they feel warrant litigation in accordance with the Wunderlich Act. *Thereupon*, * * * this Department, *as the attorneys* for the Government, will make an independent

> appraisal as to whether the suit can properly be litigated under the Wunderlich Act. * * * [Emphasis supplied.] [42 Op. Att'y Gen. January 16 (1969) at 9, 10.]
>
> * * * * *
>
> The broad executive responsibility for contract administration encompasses the separate functions of adjudication and advocacy. The contracting agency acts through its Board of Contract Appeals as *impartial arbiter of disputes.* Other organs of the agency represent the interests of the Government before the Board in the role of advocate. The advocacy aspect of the overall agency responsibility extends to determining *whether the agency* should seek review of an adverse *board* decision. [Emphasis supplied.] [42 Op. Att'y Gen. January 16 (1969) at n. 18.]
>
> * * * GAO audit can check on agency performance, but *only the contracting and legal officials of the agency have the intimate familiarity with these cases necessary for timely determination of those board decisions* in which judicial review to protect the interests of the Government is warranted. [Emphasis supplied.] [42 Op. Att'y Gen. January 16 (1969) at 11.]

Five principles stand out in the foregoing opinion. These are: (1) There must be a Board decision; (2) The Board must be an autonomous and "impartial arbiter of disputes;" (3) the Board's decision must be adverse to the interests of the government; (4) the contracting agency "on its own initiative" must seek judicial review of the Board decision; and (5) the Department of Justice acts as the attorney for the contracting agency. None of these requirements have been met in this case. Certainly, the opinion does not purport to approve an independent action by the Department of Justice on its own motion to judicially overturn the decision of an agency itself, which is the case here. Nor does it approve the proposition that an agency can appeal from its own decision. The opinion speaks only of an agency appeal from the decision of a *Board* that has acted as an "impartial arbiter" of a dispute.

In citing the 1969 opinion of the Attorney General above, I do not mean to imply that I agree with the statement therein contained that a contracting agency can obtain judicial review of an adverse Board decision. That question has not been expressly decided by this or any other court. It is

not involved here. We should decide that problem when it is presented to us in a proper case.

The long-continued practice and custom of an executive agency in administering and performing its functions and duties and in interpreting applicable statutes, is entitled to great weight in determining its powers and authority. *See United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472–3 (1915); *Udall* v. *Tallman*, 380 U.S. 1, 17 (1965); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); *Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 408 (1961); *Crawford* v. *United States*, 179 Ct. Cl. 128, 142, 376 F. 2d 266 (1967), *cert. denied*, 389 U.S. 1041 (1968). This rule is applicable here to determine the authority, or lack of it, of the Department of Justice.

It is clear from these statements of the Attorney General himself that he does not have any review or revisory power over decisions made by other agencies on matters peculiarly within their jurisdictions. He cannot substitute his own opinion for the decision of another agency, especially on questions of fact, mixed fact and law, policy, expediency, propriety, discretion, exigency or executive judgment. The above cited statutes did not enlarge his powers and authority in this regard.

The majority stresses the point that the Department's efforts here are "the uninfluenced product of the Justice Department's own thorough and independent *review* of the case." [Emphasis supplied.] It says further that "the Department considered the AEC's decision erroneous on matters of law and unsupported by substantial evidence * * *." I find no authority vested in the Department of Justice to *review* the AEC decision in any manner different from a review by any other lawyer of his client's case to familiarize himself with the issues involved in preparation for a court trial. Although not cited by the Attorney General, and apparently not relied on by him, a word should be said about Executive Order No. 6166 of June 10, 1933, issued by the President as authorized by Congress pertaining to the reorganization of executive agencies, in which broad powers were given to the Department of Justice to handle cases in

court for governmental agencies.[1] Section 5 of the order provides in effect that such Department shall represent all government agencies and officers in all courts of the United States. It further provides that the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense in any case referred to it to handle in court, "*now exercised by any agency or officer*, is transferred to the Department of Justice." I do not think this provision gave the Department the authority to review, revise nullify, or reverse the administrative decision of another executive agency such as that before us, nor to substitute its opinion therefor. Actually, it did not give the Department any more authority in this regard than it already had. It will be noted that it was only given the function of decision *now exercised by any agency or officer*. At the time of the Order (1933) no agency had ever exercised any right of appeal to a court from an adverse decision of an administrative Board or from its own decision. As applied to our case, assuming the application of the Order as of the present time I have already shown that the question of whether an agency can appeal from an adverse decision of a Board is not before us and should not be decided. As to whether or not an agency can appeal from its own decision that is adverse to the government, my view is that it cannot do so. To allow such an appeal would be to sanction an absurd and ridiculous proceeding. In the first place, there is no necessity for it. If the agency thinks the government should win, it has the complete decision making power at the agency level. Such an appeal would be as ludicrous as an appeal by this court to the Supreme Court asking that one of our decisions be reversed. I cannot imagine an executive agency of the United States putting itself in such a foolish position. Since the agency is without power to engage in such an appeal, the Department of Justice is likewise without authority to do so by the very terms of the Executive Order.

Furthermore, the Department of Justice is given no decision making authority by the Order in a case until it is

[1] Executive Order No. 6166 is reproduced in the footnote of Title 5, U.S.C.A., § 901 and also in Title 5, U.S.C. following omitted § 132, pp. 157–161 (1964 ed).

referred to the Department. Obviously such referral will not be made until the case is already filed in Court. Consequently, the words "or to appeal" refer to an appeal from the court decision and not to the administrative decision of the agency nor to a decision of a Board at the agency level. In short, the Order simply made the Attorney General the attorney for all agencies and officers of the government in cases in court and gave him the same powers to handle court cases that other attorneys have in similar circumstances in representing their clients. The Order did not empower the Attorney General to revise, modify or overturn an agency decision as he is attempting to do here. This is further shown by another paragraph of Section 5 of the Order as follows:

> Nothing in this section shall be construed to affect the function of any agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense.

The procedure being followed by the Attorney General here not only affects the function of the agency at the agency level, but actually nullifies it. If the Attorney General is to have the last word in contract appeals cases and is to have a veto power over agency and Board decisions, we might as well do away with decisions of agencies and Boards altogether, and send all such appeals directly to the Attorney General for hearings and decisions, after appropriate contract changes.

I do not think Congress ever intended to confer upon the Attorney General the power he is asserting here when it passed the Wunderlich Act. His action, with the approval of the majority opinion, has tied the whole administrative process in contract cases into a very tight knot of red tape and delay, and it may take an Act of Congress to untie it, since this court has not seen fit to do so.

A Day in Court for the Parties

The Attorney General, in effect, urges that the parties here are entitled to their "day in court" on the finality issue and on the merits. At first blush, this is appealing to the American sense of justice and fair play. However, when it

is applied to the facts and procedures in this case, it loses its appeal. The plaintiff does not want a hearing in court. All he wants is the enforcement of the decision and to be relieved of inter-departmental squabbling over powers and duties. The AEC, the only other party to the suit, has had the questions involved in the case heard *four* times already by those authorized by the contract to hear them, namely, the contracting officer, the examiner and twice by the AEC itself, all of whom represented the government. The AEC has not asked for a court hearing on whether or not its decision is final nor on the merits, and, if it could speak out, it would no doubt oppose it. That only leaves the Attorney General, who is not a party and who appears in the case as an attorney. He wants a hearing in court to enable him to assert a theory contrary to the decision of his client, the AEC. His argument is unpersuasive.

The effect of the majority opinion is to allow the Attorney General *sua sponte* to appeal from the decision of another executive agency adverse to the government for the purpose of overturning it, and, by dicta, authorizes him to similarly appeal from an adverse Board decision for the same purpose. Such a procedure imposes an additional layer of bureaucratic red tape that contractors must overcome before they receive final decisions along the administrative trail on their claims under the disputes clause in government contracts. It easily adds from one to three years, and perhaps more, to the already extended period of time for processing a contractor's claim. Under such a system, how can a knowledgeable contractor afford to do business with the government?

Quantum and Breach of Contract

The trial commissioner held that the failure of the AEC to pay the plaintiff and carry out its decision for a period of over five years after it was rendered was a breach of contract. He also held that the administrative procedure was inadequate and unavailable and under the authority of *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966), we should proceed to hold a trial on the quantum due plaintiff on his claims. Judge Collins also held in his dissent that there was a breach of contract by the AEC, citing *United*

States v. *Marietta Mfg. Co.*, 268 F. Supp. 176 (S.D. W. Va. 1967). While a breach of contract is strongly indicated, I feel that the AEC cannot be blamed for failure to pay the plaintiff because of the action of the GAO and especially because of its threat to charge any payment made to the certifying officer of the AEC. Therefore, I would not hold that the AEC breached the contract. Also, I feel that, although probably justified, the better policy would be not to hold the trial on quantum here but to remand the case to the AEC and its contracting officer for that purpose.

CONCLUSION

I would deny the motion of the Attorney General for summary judgment, and grant plaintiff's motion for summary judgment, and remand the case to the AEC and its contracting officer for the purpose of enforcing and carrying out the final decision of the AEC.

COWEN, *Chief Judge*, concurs in the foregoing dissenting opinion of Judge Skelton.

COLLINS, *Judge*, dissenting:

I concur in Judge Skelton's opinion except that I would hold that, in failing to pay its own award, the AEC breached its contract with S & E. Because of the broad impact of the court's opinion, however, I feel compelled to address myself to the issues as the court has framed them.

The court's decision in this case will, in one fell swoop, render the already troubled business of Government contracting hopelessly chaotic. I am convinced that today's decision is wholly undesirable and supportable only by a strained interpretation of legislative history.

The essence of the court's opinion is that the Wunderlich Act, 41 U.S.C. §§ 321–22 (1964), affords the Government the right to judicial review of decisions of its own agencies, rendered pursuant to the standard "disputes" clause in Government contracts, adverse to it. Support for this conclusion comes, according to the court, from the words of the act itself and from bits of legislative history which, in the court's words, "albeit not explicitly, in general supports * * * [the court's] construction." My own view of the act and its pre-enactment history leads me to the contrary conclusion.

Contrary to the court's opinion, I do not read the act as extending judicial review to both parties "equally and under like conditions." The clear and unambiguous language of the act reveals that, far from extending the right of judicial review to the Government, it merely serves to limit the contents and effect of the "disputes" clause, which has a history long antedating the act.

Furthermore, since a statute is merely the attempted verbalization of the legislative will, statutes must be read with an eye on the underlying legislative intent. In 1892, the Supreme Court, speaking through Mr. Justice Brewer, commented as follows:

> * * * It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. * * *
>
> * * * "* * * The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed." * * *

Church of the Holy Trinity v. *United States*, 143 U.S. 457, 459–60 (1892), *cited with approval in Inter-City Truck Lines, Ltd.* v. *United States*, 187 Ct. Cl. 290, 295, 408 F. 2d 686, 688–89 (1969), *Select Tire Salvage Co.* v. *United States*, 181 Ct. Cl. 695, 703, 386 F. 2d 1008, 1012 (1967). More recently, the Supreme Court has said that:

> * * * When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, *however clear the words may appear on "superficial examination."* * * * *A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, "excepting as a different purpose is plainly shown."* [Footnotes omitted, emphasis supplied.]

United States v. *American Trucking Ass'ns*, 310 U.S. 534, 543–44 (1940).

For courts to interpret statutes in such a way as to extend, limit, modify, or alter in any way the manifest intent of the legislature amounts, in my view, to a clear usurpation of the legislative function. As I shall attempt to demonstrate, the act in question has but a single and limited purpose which does not at all support the court's conclusion in this case.

The Wunderlich Act (which, more appropriately, might be called the Anti-Wunderlich Act) was Congress' direct response to the Supreme Court's decision in *United States* v. *Wunderlich*, 342 U.S. 98 (1951). In that case, reversing this court, the Supreme Court held that a decision of an agency head (or the contract appeals board to which he has delegated authority) under the "disputes" clause [1] could not be overturned on judicial review "unless it was founded on fraud, alleged and proved." 342 U.S. at 100. The devastating effect of the *Wunderlich* decision was well described by Justice Douglas when he said, in dissent, that "[i]t makes a tyrant out of every contracting officer." 342 U.S. at 101.

The evil perceived by Justice Douglas and the other dissenters did not escape congressional attention, and several bills were introduced, in both houses, to remedy the evil. Each house held its own hearings on the matter. The Senate hearings, from which testimony is quoted by the court, were held in 1952. Witnesses at these hearings, representing both Government and industry, were understandably alarmed by the degree of finality which the Supreme Court's decision had accorded administrative decisions under the "disputes" clause.

The flavor of the witnesses' testimony regarding appeal from such decisions is, in many cases, ambiguous and, in no event, can be viewed as an endorsement of the position that the Government should be able to disavow and seek judicial

[1] The usual pre-Wunderlich Act "disputes" clause was as follows:

"ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

review of adverse board decisions. On the contrary, if there is a discernible flavor to the Senate hearings, it is that only the contractor should have the benefit of judicial review.

For example, the testimony of Frank L. Yates, Assistant Comptroller General of the United States, quoted by the court, is to the effect that "the rights of contractors and the Government to review or appeal should be coextensive." *Hearings on S. 2487 Before the Senate Subcomm. of the Comm. on the Judiciary*, 82d Cong., 2d Sess. 11 (1952). At the same time, however, Mr. Yates testified as follows:

> * * * Such a law [a modified version of S. 2487 offered by the GAO] not only would protect a contractor from fraudulent, arbitrary or capricious action by giving him, *in addition to resort to the courts*, a further administrative remedy before the General Accounting Office, a time saving and less expensive proceeding, but it would also provide a protection, through the General Accounting Office, against decisions adverse to the interests of the United States. * * * [Emphasis supplied.]

Id. The witness' careful reference to the right which each party would have to review by the GAO and his obvious failure to refer to a concomitant right on the part of the Government to have "resort to the courts" can only indicate that, in urging "coextensive" rights of review for both parties, Mr. Yates was referring to GAO, not judicial, review.

The court also quotes from the testimony of John C. Hayes, counsel for the Associated General Contractors of America, Inc. At one point Mr. Hayes stated, as the court quotes, that the position of his organization was that:

> * * * any decision made by a contracting officer or head of a department, agency, or bureau, should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of both the contracting parties, and supported by the evidence upon which such decision was based.

Id. at 29. The court fails, however, to quote later testimony of this witness which adds a vital gloss to the quoted testimony:

> In concluding, we respectfully urge that this committee draft legislation that will grant the United States Court of Claims, and the United States district courts

> to the extent that they now exercise jurisdiction concurrent with the United States Court of Claims, jurisdiction to hear, determine, *and enter judgment against the United States on any claim in which the contractor shall seek a review of a decision on a disputed question between the United States and such contractor, made by an officer, board, or other representative of the United States under any contrdct entered into with the United States.* [Emphasis supplied.]

Id. at 30. Clearly, looking at his testimony in its entirety, Mr. Hayes was of the opinion that the Government's rights in contract disputes were adequately protected by the "disputes" clause, which reposes decision-making authority in the Government agencies, and that judicial review was needed only to protect the rights of contractors.

The House Committee report accompanying the final draft of the act as passed in 1954 states, unequivocally, that the purpose of the act—the only purpose—was "to overcome the effect of the Supreme Court decision in the case of *United States* v. *Waunderlich* [*sic*] (324 U.S. 98), rendered on November 26, 1951, under which the decisions of Government officers rendered pursuant to the standard disputes clauses in Government contracts are held to be final absent fraud on the part of such Government officers." H.R. Rep. No. 1380, 83d Cong., 2d Sess. 17 (1954). Thus, the express legislative purpose underlying the act was to do no more than reopen the channels of judicial review of decisions of Government officials pursuant to the "disputes" clause to the extent they had been open prior to the *Wunderlich* decision. Prior to *Wunderlich*, the Government could obtain such review of board decisions adverse to it only in those rare situations when, for fraud or other such compelling reasons, the General Accounting Office could and did set aside a "disputes" clause decision in favor of a contractor.

Perhaps the strongest support for my conclusion that the Wunderlich Act was not intended to provide the Government with the right of judicial review of adverse board decisions lies in the fact that Congress explicitly refrained from granting the GAO any greater power under the act than it already possessed. The House hearings reflected more

than passing concern with that portion of a House bill [3] and the Senate bill, which gave the GAO, along with the courts, the power to review "disputes" clause decisions. The position of many of the opponents of this provision was well stated in a letter to the Chairman of the House Committee on the Judiciary from Mr. Roger Kent, general counsel of the Department of Defense:

> To superimpose General Accounting Office review on existing disputes clause procedures would not only create a completely new review, it would, as a practical matter, eliminate the usefulness of the disputes clauses themselves by destroying the concept of finality and dividing the responsibility for determining the merits of any given appeal. Undoubtedly, this would generate protracted and expensive disagreements among Government agencies, the General Accounting Office and contractors representatives. This would defeat the aims of both the Government and its contractors by making it impossible to accomplish the very purposes of the disputes clause; i.e., the achievement of proper and expeditious performance of contracts.

Hearings on H.R. 1839, S. 24, H.R. 3634, and H.R. 6946 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 82d Cong., 1st and 2d Sess., ser. 12, at 132 (1953–54).

In the end, the opponents prevailed and the objectionable provision was dropped. More importantly, however, the report accompanying the bill in its final form was careful to explain that the bill would not alter in any way the jurisdiction of the GAO:

> The proposed legislation, as amended, will not add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the

[3] One of the bills under consideration, sponsored by the GAO, was H.R. 1839, 83d Cong., 1st Sess. (1953):

"• • • That no provision of any contract entered into by the United States, relating to the finality or conclusiveness, in a dispute involving a question arising under such contract, of any decision of an administrative official, representative, or board, shall be pleaded as limiting judicial review of any such decision to cases in which fraud by such official, representative, or board is alleged; and any such provision shall be void with respect to any such decision which *the General Accounting Office* or a court, having jurisdiction, finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence. [Emphasis supplied.]

"Sec. 2. No Government contract shall contain a provision making final on a question of law the decision of an administrative official, representative, or board."

> course of a settlement or upon audit, and the language used is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.[3]

H.R. REP. No. 1380, 83d Cong., 2d Sess. 23 (1954). What, then, was the jurisdiction of the GAO before the adoption of the Wunderlich Act?

The Budget and Accounting Act of 1921, 31 U.S.C. §§ 71–134 (1964), conferred upon the GAO basic audit and settlement authority.[4] As early as 1922, however, the Supreme Court made it perfectly clear that the GAO had "no power" to upset the decision of a contracting officer where the authority to render that decision had been given to the contracting officer by the terms of the contract. *United States* v. *Mason & Hanger Co.*, 260 U.S. 323 (1922). Perhaps the most quoted language relating to the powers of the GAO in these matters is found in the district court's opinion in *James Graham Mfg. Co.* v. *United States*, 91 F. Supp. 715 (N.D. Cal. 1950):

> The powers of the Comptroller General are extensive and broad. But he does not, *absent fraud or overreaching*, have authority to determine the propriety of con-

[3] The report also states: "It is intended that the General Accounting Office, *as was its practice*, in reviewing a contract and change orders for the purpose of payment, shall apply the standards of review that are granted to the courts under this bill." [Emphasis supplied.] H.R. REP. No. 1380, 83d Cong., 2d Sess. 23 (1954). As will be shown, however, this unfortunate statement resulted from a misunderstanding of the former practice of the GAO in reviewing board awards. "While the legislative history contains some conflicting statements, on balance it does indicate that Congress did not intend to set GAO up as an additional layer of administrative appeal for contractors on disputes clause questions." 42 OP. ATT'Y GEN. 33 (1969).

[4] The relevant provisions of the act are as follows:

"All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office." [31 U.S.C. § 71 (1964).]

"Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement." [31 U.S.C. § 74 (1964).]

"The liability of certifying officers or employees shall be enforced in the same manner and to the same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers; and they shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification." [31 U.S.C. § 82d (1964).]

> tract payments when the contracts themselves vest the final power of determination in the contracting executive department. * * * [Footnote omitted, emphasis supplied.]

Id. at 716.[8]

Decisions of this court prior to passage of the act, likewise, leave no room for doubt that, except in cases where fraud or overreaching was involved, this court viewed as wholly without legal effect the action of the GAO in overturning a decision by a Government officer authorized by the contracting parties to be the deciding authority on disputes arising under the contract. *See, e.g., Bell Aircraft Corp.* v. *United States*, 120 Ct. Cl. 398, 100 F. Supp. 661 (1951), *aff'd*, 344 U.S. 860 (1952); *McShain Co.* v. *United States*, 83 Ct. Cl. 405 (1936); *Maryland Dredging & Contracting Co.* v. *United States*, 66 Ct. Cl. 627 (1929).

It thus becomes apparent that if the legislative intent underlying the Wunderlich Act is to be given proper effect, the jurisdiction of the GAO to overturn board decisions under the "disputes" clause must be restricted to those instances where such decisions are produced through fraud or overreaching. In this case, our commissioner found that "the record is wholly devoid of any indication that the administrative decisions favorable to the plaintiff were tainted by fraud or overreaching." In *Climatic Rainwear Co.* v. *United States*, 115 Ct. Cl. 520 (1950), this court held that, where the parties to a Government contract agree that a designated Government official is to determine factual disputes between the parties, "[t]he discharging of these functions could neither be delegated to nor usurped by anyone not authorized by the terms of the contract." *Id.* at 559. *See also New York Shipbuilding Corp.* v. *United States*, 180 Ct. Cl. 446, 385 F. 2d 427 (1967). While it is not clear, in this case, whether the AEC "delegated" authority to the GAO or the GAO "usurped" the AEC's authority under the "disputes" clause, it is clear that one of those two events must have occurred. For the foregoing reasons, I can only conclude, as did our commissioner in his excellent and well-reasoned report, that

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[8] *See also Leeds & Northrop Co.* v. *United States*, 101 F. Supp. 999 (E.D. Pa. 1951); *Consolidated Vultee Aircraft Corp.* v. *United States*, 97 F. Supp. 948 (D. Del. 1951).

the GAO acted without authority in advising the AEC that none of the disputed claims was supported by substantial evidence, that all were erroneous on matters of law, and that payment on any of them would be improper.

In the present case, this court, by an act of judicial legislation, is doing what Congress specifically refused to do legislatively, *i.e.*, the court is effectively conferring upon the GAO authority to review final administrative decisions under the "disputes" clause of Government contracts for the purpose of ascertaining whether such decisions are supported by substantial evidence and otherwise meet the criteria set out in the Wunderlich Act. Moreover, the court is conferring such authority without imposing upon the GAO any collateral requirement that it grant procedural due process to contractors in exercising the power of review. This is both unfair and exceedingly disadvantageous to persons who enter into contracts with the Government.

This brings me to a consideration of the court's holding that a refusal by the Government to pay a board award is not a breach of the "disputes" clause, *even though the refusal results "from a change of heart in the agency itself,"* if the involved award is not entitled to finality under the Wunderlich Act.[6] [Emphasis supplied.] To hold to the contrary, the court reasons, would violate the terms of the act.

As I have pointed out previously, the act had, and has, a very limited purpose—to overcome the effect of the *Wunderlich* decision. Since, at the time that decision was rendered, it would have been unprecedented for an agency to repudiate, or to seek judicial confirmation of, its own decision, I find it difficult to believe that Congress ever intended to confer this right which would vastly change the disputes procedure. Congress' intent, express and implied, was to return to the disputes process as it had existed before *Wunderlich*, not to introduce radically different, new elements into that process.

A brief look at the realities of the disputes procedure reveals that Congress could never have intended that the act be read as the court reads it. When a dispute arises be-

[6] It should be noted that, in this case, the AEC never had a "change of heart." The agency never reversed its determination of plaintiff's claims; its refusal to pay was based solely on the implied threat of the Comptroller General.

tween a contractor and the Government, the "disputes" clause sets out clearly the procedure to be followed.[7] First, the parties may voluntarily settle the dispute. If they do, that is the end of the matter. If no settlement is reached, the disputed matters are decided by the agency's contracting officer. If the contractor does not appeal to the agency from the contracting officer's decision within the prescribed time, that, again, is the end of the matter. If, however, the contractor does appeal to the agency, then, according to the court, a decision rendered by the agency or its board [8] favorable to the contractor is not the end of the matter; the agency is free at any time to disavow or repudiate its own decision, thereby forcing the contractor to sue. The anomaly created by the court's decision is too obvious to need elaboration. While an agency will still be bound by the decisions of its contracting officers, it will not be bound by decisions made at the highest level.[9]

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[7] The "disputes" clause which was included in the contract between plaintiff and defendant is as follows:

"(a) • • • [A]ny dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission • • • shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. • • •

"(b) This 'Disputes' clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law."

[8] The following provision of the Armed Services Procurement Regulations is instructive both as to the relationship between the agencies and their boards of contract appeals and as to the expectations of the parties when entering into a contract containing a "disputes" clause:

"• • • Decisions of the Armed Services Board of Contract Appeals constitute decisions of the Head of the Department as referenced in the Disputes clause standard in all Government contracts. *It is expected that decisions favorable to the appellant in whole or in part will be promptly implemented by payment at the contracting officer level.* • • •" [Emphasis supplied. 32 C.F.R. § 1.314(g) (1970).]

The prompt payment of a claim by a contracting agency which has found it valid is the principal consideration for the unusual obligation of a Government contractor to proceed with the work while his claim is being considered.

[9] In *Maitland Bros.*, ASBCA No. 6607, 66-1 BCA ¶5416, the Armed Services Board of Contract Appeals held that the unappealed decision of a contracting officer, under a disputes clause, becomes final and conclusive on both parties, "thereby creating vested rights in such decision." *Id.* at 25,430. If a contracting officer's decision can create vested rights in a contractor, it seems illogical to conclude, as does the court, that the decision of the agency, made at the highest level, cannot create such rights.

The suggestion that the Government, after deciding a contract dispute with one of its contractors in favor of the contractor, can then promptly disavow that decision carries with it an enormous potential for mischief. It means that the Government, after deciding that its contractor's claim is meritorious, based on a *preponderance* of the evidence presented to it, can then turn around and reject the claim because there is *substantial* evidence (*i.e.*, less than a preponderance) to support the opposite result. The majority opinion puts a tremendous economic burden on Government contractors who are now faced with the prospect of prolonged judicial proceedings in order to collect funds to which the agencies have already found them entitled. After today's decision the Government would be foolish to pay *any* board awards.

Moreover, the court's decision will utterly defeat the purpose and utility of the "disputes" clause, which has served admirably over the years, and will seriously hamper the Government in virtually all its activities whenever it is forced to call on the resources of private firms. The purpose of the clause has been to promote the expeditious performance of Government contracts. By destroying the finality of board decisions favorable to contractors, the court has assured that the performance of Government contracts will be anything but expeditious. Protracted and expensive litigation has never been known for its beneficial effect on contract performance.

It should also be noted that contract prices in the future can only be expected to rise substantially due to increased contingency costs. The court's decision effectively removes any incentive which agencies, undeterred by the costs of litigation, might have to implement board decisions by payment. Indeed, the decision gives the agencies negative incentive. We would be foolish to think that contractors will overlook, in preparing bids, the vast potential for economic coercion which today's decision places in the hands of the Government and the many locations within the bureaucracy where this potential will lie. Furthermore, this rise in contract prices will undoubtedly far exceed whatever the Government might save in those rare instances when this court or another would overturn an agency decision in favor of a contractor.

Refusing to permit agencies to disavow their own decisions would by no means make the Government easy prey for the ill founded claims of contractors. In the first place, the "disputes" clause itself puts the power of decision making in the hands of the Government. It would not be speculative to assume that, if the boards established by the Government for this purpose err, they err in favor of the Government. As Justice Jackson said, dissenting in *Wunderlich*, "[m]en are more often bribed by their loyalties and ambitions than by money." 342 U.S. at 103. Secondly, the GAO still has the authority to review board decisions for fraud or overreaching.

The statements in *C. J. Langenfelder & Son* v. *United States*, 169 Ct. Cl. 465, 341 F. 2d 600 (1965), and *Acme Process Co.* v. *United States*, 171 Ct. Cl. 251, 347 F. 2d 538 (1965), upon which the court relies for substantiation of its position, to the extent they are inconsistent with the views expressed herein, should be recognized for their unwisdom and overruled.

In conclusion, I would hold that the Wunderlich Act does not, and was never intended by Congress to, invest the federal agencies or their counsel with authority to challenge the decisions which the agencies themselves have made pursuant to a contractual provision, and that a failure by such an agency to pay an award arrived at pursuant to a "disputes" clause results in a breach of that clause.[10] If the disputes procedures, which contractors must accept if they are to obtain Government contracts, are to serve the purpose of expediting the performance of contracts, it is absolutely essential that decisions adverse to the Government rendered by boards of its own creation be imbued with finality. Certainly the Wunderlich Act was never designed to bring about the chaos which I fear will be the result of the court's decision.

[10] *See United States* v. *Marietta Mfg. Co.*, 268 F. Supp. 176 (S.D. W. Va. 1967). In that case the court held that the Government's failure to follow the disputes procedures, as found in its Federal Procurement Regulations and in the contract, was a breach of the contract.

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APPENDIX B

IN THE
UNITED STATES COURT OF CLAIMS

No. 104-67

(Filed September 26, 1969)

S&E CONTRACTORS, INC. v.
THE UNITED STATES

REPORT OF COMMISSIONER TO THE COURT*
ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT

Geoffrey Creyke, Jr., attorney of record for plaintiff. *Hudson and Creyke* and *Locke, Purnell, Boren, Laney & Neely*, of counsel.

James F. Merow, with whom was *Assistant Attorney General Edwin L. Weisl, Jr.*, for defendant. *Edward M. Jerum* and *Vasil S. Vasiloff*, of counsel.

OPINION

WHITE, *Commissioner:* This is one of the many cases involving Government contracts in which the court has been called upon to review decisions rendered by Government contracting agencies. This case is unique, however, in that here the contractor is taking the position that it is entitled to a summary judgment upon the basis of favorable decisions on its claims previously rendered by the agency with which it contracted, while the Government takes the somewhat paradoxical position that the particular decisions by its own agency were improper.

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* The opinion and recommended conclusion of law are submitted pursuant to the order of reference and Rule 166(c). The facts pertinent to the disposition of the cross-motions are stated in the opinion.

Cross-motions for summary judgment have been filed by the parties. It is my opinion that the plaintiff's motion should be allowed and judgment should be entered for the plaintiff on the issue of the defendant's liability, and that the defendant's cross-motion should be denied.

I. INTRODUCTION

This case involves several claims that arose under Contract No. AT(30-3)-790 between the plaintiff and the defendant (represented by the Atomic Energy Commission). Contract No. AT(30-3)-790 ("the contract") called for the construction by the plaintiff of a testing facility for the Atomic Energy Commission ("the Commission") at the National Reactor Test Station in Idaho. The testing facility consisted of a large concrete basin and accompanying structures. The preliminary excavation work at the site of the testing facility was performed by a separate contractor, Nelson Bros.

The contract was awarded to the plaintiff on August 4, 1961, and notice to proceed with the work under the contract was given to the plaintiff on August 10, 1961. (Bids for the performance of the work under the contract had been opened on June 20, 1961, but the award of the contract to the plaintiff as the lowest responsible bidder was delayed because of difficulties encountered by Nelson Bros. in connection with the excavation of the site for the testing facility.)

Under the original provisions of the contract, the plaintiff was to receive $1,272,000 as a fixed price for the performance of the work, and the work was to be completed within 180 days after the issuance of the notice to proceed. However, six change orders were issued during the life of the contract; and they increased the contract price to $1,364,794.70 and extended the

time for the completion of the work from February 6, 1961, to March 23, 1962. The work was actually completed, and was accepted by the Commission, in the latter part of June 1962.

The petition refers to eight claims which were considered by the contracting officer, by a hearing examiner, and by the Commission itself, and on which the plaintiff ultimately failed to receive the desired relief from the administrative agency. However, the petition indicates that the plaintiff has abandoned one of the claims, referred to as "Felting of Damper Blades."

The nature of the remaining seven claims, and the actions that were taken on such claims by the contracting officer, the hearing examiner, and the Commission, will be summarized in parts II-VIII of this opinion.

II. THE "ACCESS" CLAIM

Under the provisions of the contract, as supplemented by a memorandum of understanding between the parties, the plaintiff was to be afforded the opportunity "to proceed with all work in the major portion of the westerly half of the building" from and after the issuance of the notice to proceed on August 10, 1961.

Asserting that the activities of Nelson Bros., the separate excavation contractor, restricted the plaintiff's access to the construction site during the period between August 10 and September 10, 1961, and thus prevented the plaintiff from proceeding "with all work in the major portion of the westerly half of the building" during such period, the plaintiff submitted to the contracting officer a request for an equitable adjustment under the "suspension of work" provision of the contract. That provision constituted paragraph 32 of the general provisions of the contract, and stated in part as follows:

> The Contracting Officer may by written order direct the Contractor to suspend all or any part of the work for such period of time as may be determined by the Contracting Officer to be necessary or desirable for the convenience of the Government. If such suspension unreasonably delays the progress of the work and causes additional expense or loss to the Contractor in the performance of the work, not due to the fault or negligence of the Contractor, an equitable adjustment in the contract price and time for performance shall be made in accordance with the agreement of the parties, and the contract shall be modified in writing accordingly * * *. A failure to agree on an equitable adjustment under this clause shall be deemed to be a dispute within the meaning of the clause of this contract entitled "Disputes".

In a decision dated August 8, 1962, the contracting officer denied the plaintiff's claim for an equitable adjustment under the "suspension of work" provision of the contract. The contracting officer determined, in effect, that the plaintiff had not been adversely affected in the performance of the work because of the plaintiff's "inability * * * to have unlimited, unrestricted and exclusive access to the construction site during the period beginning August 10, 1961, and ending September 10, 1961."

The plaintiff took an appeal to the Commission from the contracting officer's determination. The appeal was taken under the "disputes" provision of the contract, which was similar to the standard paragraph on the subject of disputes customarily found in Government construction contracts, except that appeals by the contractor from decisions of the contracting officer concern-

ing questions of fact were to be taken to the Commission rather than to the individual head of a department or agency, and the Commission had not, at the time, established a board of contract appeals to act for it on contract disputes.

The Commission referred the plaintiff's appeal to a hearing examiner for the holding of a hearing and the preparation of a report. The hearing examiner's report was issued under the date of June 26, 1963.

In his report, the hearing examiner found as a fact that because the operations of Nelson Bros. during the period August 10–September 10 unduly restricted the plaintiff's access to the basin, the major portion of the basin was not available for "all" work on the part of the plaintiff at any time between August 10 and September 10, 1961. On that basis, the hearing examiner further found that the work was suspended under paragraph 32 of the general provisions of the contract until September 10, when the plaintiff obtained unrestricted access to the basin and it became available for "all" work on the part of the plaintiff. The hearing examiner concluded, therefore, that the plaintiff was entitled to a 31-day extension of the time fixed in the contract for the completion of the work, and was also "entitled to an equitable adjustment for the costs entailed by the delay." The hearing examiner did not, however, compute the monetary amount of the equitable adjustment which the plaintiff was to receive.

The plaintiff's "access" claim was considered by the Commission in a decision that was rendered on May 13, 1964. The Commission did not accept the hearing examiner's conclusion that the plaintiff's work under the contract was wholly suspended until September 10, 1961, because of the activities of Nelson Bros. On the other hand, the Commission held, in effect, that there was

some unreasonable interference by Nelson Bros. with the plaintiff's work during the period between August 10 and September 10, 1961, and that an equitable adjustment was proper to compensate the plaintiff for the delay in its operations attributable to such interference by Nelson Bros.

The Commission regarded the record before it as inadequate for the making of a determination regarding the extent to which the activities of Nelson Bros. actually interfered with the plaintiff's work during the period between August 10 and September 10, 1961. Consequently, the Commission remanded the matter to the contracting officer for the conduct of negotiations with the plaintiff looking toward a settlement relative to the amount of the equitable adjustment on the plaintiff's "access" claim, and directed that, if a settlement could not be arranged, the contracting officer should render a decision on the amount of the equitable adjustment (which would be subject to another appeal by the plaintiff to the Commission under the "disputes" provision of the contract).

For reasons that will be explained in part IX of this opinion, the plaintiff never received any administrative relief on its "access" claim under the Commission's decision.

III. THE "CONCRETE" CLAIM

The contract contained the standard "changes" provision generally found in Government construction contracts. Acting under the authority of that provision, the contracting officer on October 2, 1961, issued Change Order No. 2, which effected a substantial change in the specifications relating to the concrete work. The change order provided that "the contract price will be increased in the amount of $90,429.00 * * * and the contract

completion date will be extended by 30 calendar days"; and that "a contract modification will be executed to formalize this change in contract price and time."

The plaintiff submitted to the contracting officer a claim which, as subsequently modified, requested that the time for the completion of the work under the contract be extended 150 days on account of the issuance of Change Order No. 2, and that the contract price be increased by the amount of $139,807.

The contracting officer held that the time and price adjustments provided for in Change Order No. 2 were the result of prior negotiations and reflected an agreement between the plaintiff and the Government; and, accordingly, that the plaintiff was not entitled to any increase in the time extension of 30 calendar days, or to any increase in the price adjustment of $90,429, provided for in Change Order No. 2.

The plaintiff took an appeal from the contracting officer's decision to the Commission under the "disputes" provision of the contract. This appeal was referred by the Commission to the hearing examiner previously mentioned.

The plaintiff's "concrete" claim was discussed in the hearing examiner's report of June 26, 1963. The hearing examiner found as a fact that the parties did not intend to be bound by the negotiations which preceded the issuance of Change Order No. 2; and, therefore, that Change Order 2 was a unilateral change order and did not bind the plaintiff, either with respect to the 30-day time extension or the $90,429 price adjustment provided for in the order. The hearing examiner said that a time extension "of at least 60 days," and perhaps more, should have been granted on the plaintiff's "concrete" claim.

The hearing examiner indicated that the plaintiff's "concrete" claim should be remanded to the contracting officer for the conduct of negotiations with the plaintiff looking toward a settlement of this claim or, in the absence of an agreed settlement, for the making of a new decision by the contracting officer respecting the time and monetary adjustments to which the plaintiff was entitled on the "concrete" claim under the "changes" provision of the contract.

The plaintiff's "concrete" claim was considered by the Commission in a memorandum and order dated November 14, 1963. The Commission accepted the hearing examiner's factual finding that the parties did not intend to be bound by the preliminary negotiations which preceded the issuance of Change Order No. 2, and also left outstanding the hearing examiner's proposal that this claim be remanded to the contracting officer for the negotiation of an agreed settlement with the plaintiff, if possible, or the issuance of a new decision by the contracting officer on the amount of the equitable adjustments as to time and money which the plaintiff was entitled to receive on the "concrete" claim under the "changes" provision of the contract.

The purpose of the remand was never accomplished, for the reasons stated in part IX of this opinion.

IV. THE "STEAM" CLAIM

Paragraph SC-07 of the contract specifications provided in part that "Steam will furnished by the Commission for construction and temporary heating purposes at no cost to the Contractor providing the requirements do not overload the available service or interfere with Commission operations." During the course of the performance of the work under the contract, the plaintiff sub-

mitted to the contracting officer a claim based upon the alleged failure of the Commission to provide steam for weather protection and concrete curing during the fall of 1961 and the early winter of 1961-62.

The contracting officer denied the plaintiff's "steam" claim. In doing so, the contracting officer held that if the completion of the work under the contract "was delayed by any circumstances or factors related to the availability of Government-furnished steam, such delay was the result of fault or negligence on the part of the Contractor."

The plaintiff took an appeal to the Commission under the "disputes" provision of the contract from the contracting officer's action in denying the plaintiff's "steam" claim. The Commission referred the matter to the hearing examiner previously mentioned.

In his report, the hearing examiner found as a fact that the Commission had an adequate supply of steam at the jobsite for the use of the plaintiff—without overloading the available service or interfering with the operations of the Commission—by November 11, 1961; that the contract contemplated that such steam would be made available to the plaintiff at manhole No. 3; that almost immediately after the steam was turned on, an anchor block and expansion joints broke down at manhole No. 3 and, as a consequence, the steam was turned off; that the Commission thereafter proceeded with repair work at manhole No. 3; that everyone expected that this work would be successfully carried to completion within a short period of time, and the plaintiff was assured a number of times during the next 6 weeks that steam would soon be available at manhole No. 3, but that the repair work was not completed until April 1962, due to negligence on the part of the Commission; and that in January 1962, the plaintiff abandoned hope of receiving

steam from manhole No. 3 and tied into another manhole on the other side of the basin. The hearing examiner further found that 25 days of delay in the completion of the work under the contract resulted directly from the lack of steam.

In addition, the hearing examiner stated in his report that the Commission's action in making it necessary for the plaintiff to obtain steam at a source other than manhole No. 3 amounted to a constructive change order; and that the plaintiff was entitled to an equitable adjustment to cover the additional cost involved in obtaining steam from a source other than manhole No. 3. The hearing examiner did not compute the amount of the monetary adjustment due the plaintiff.

The plaintiff's "steam" claim was mentioned by the Commission in its memorandum and order dated November 14, 1963, and in its decision dated May 13, 1964. The Commission accepted the hearing examiner's finding that the plaintiff was delayed by, and was entitled to a time extension because of, the Commission's failure to furnish steam. However, the Commission indicated that there was an "arithmetical" inconsistency between the hearing examiner's conclusion that the delays in the completion of the work under the contract attributable to the lack of steam totaled 25 days, on the one hand, and certain specific findings made by the hearing examiner with respect to the days when such delays occurred. The Commission itself did not make any computation regarding the extent to which the plaintiff was delayed in the performance of the work under the contract by the Commission's failure to furnish steam in accordance with the provisions of the contract.

The Commission did not refer specifically to the hearing examiner's conclusion that the plaintiff was entitled to an equitable adjustment under the "changes"

provision of the contract because of the constructive change relative to the source from which the plaintiff was required to obtain the steam. Hence, it is reasonable to infer that the Commission accepted this portion of the hearing examiner's report.

The plaintiff's "steam" claim was covered by general language in the Commission's memorandum and order dated November 14, 1963, and the Commission's decision dated May 13, 1964, to the effect that the entire proceeding was remanded to the contracting officer with directions "to effect promptly equitable adjustments and payments to which the appellant [plaintiff] is entitled," and with the further directive that in the event of disagreement between the contracting officer and the plaintiff concerning a particular adjustment or payment, "the contracting officer will make a determination pursuant to the disputes clause of the contract, subject to appeal."

As indicated in part IX of this opinion, the purpose of the remand was never accomplished.

V. THE "WEATHER" CLAIM

During the course of the construction work under the contract, the plaintiff submitted to the contracting officer a request which, as subsequently amended, asked that the time for the completion of the work be extended for more than 100 days on account of adverse weather conditions. The contracting officer granted this request only to the extent of 4 days. Otherwise, the request was denied on the ground that the weather which the plaintiff encountered during the progress of the work under the contract was not any more severe than the weather which the plaintiff should reasonably have expected to encounter in the geographical area where the work was being performed.

The plaintiff took an appeal to the Commission under the "disputes" provision of the contract from the contracting officer's denial of the major portion of the plaintiff's "weather" claim.

This claim was included in the referral by the Commission to the hearing examiner, and it was discussed in the hearing examiner's report. The hearing examiner set out a considerable quantity of data concerning weather conditions where the work under the contract was performed; and the hearing examiner found that unusually severe weather directly caused 56-3/4 days of delay in the plaintiff's operations under the contract.

The plaintiff's "weather" claim was considered by the Commission in its memorandum and order of November 14, 1963. The Commission accepted the hearing examiner's finding that the plaintiff's operations were delayed by unusually severe weather. However, the Commission said that the hearing examiner's conclusion that the delays caused by unusually severe weather totaled 56-3/4 days was inconsistent with the hearing examiner's detailed findings concerning the specific days on which the plaintiff's operations were adversely affected by unusually severe weather. The Commission then indicated that it was remanding the "weather" claim to the contracting officer "for the purpose of ascertaining whether an unambiguous foundation may be achieved on which the parties may negotiate a final settlement or on which the contracting officer may reach a more detailed decision * * *."

No final action was ever taken by the agency on the plaintiff's "weather" claim, for the reasons stated in part IX of this opinion.

VI. THE "ACCELERATION" CLAIM

Paragraph GC-09 of the contract specifications required the plaintiff, within 5 days after commencing the work under the contract, to prepare and submit to the Commission for approval "a practicable schedule * * * in the form of a progress chart of suitable scale to indicate appropriately the percentage of work scheduled for completion at any given time"; and it further required the plaintiff to furnish such personnel and equipment, and to work for such hours, "as may be necessary to insure the prosecution of the work in accordance with the approved progress schedule." The paragraph further provided in part as follows:

> * * * If, in the opinion of the Commission, the Contractor falls behind the progress schedule, the Contractor shall take such steps as may be necessary to improve his progress and the Commission may require him to increase the number of shifts and/or overtime operations, days of work and/or the amount of construction plant, all without additional cost to the Government.

The original progress schedule, as prepared by the plaintiff and approved by the Commission, was revised in October 1961 to reflect the 30-day extension of time for the completion of the work under the contract granted in Change Order No. 2; and the progress schedule was further revised in November 1961 to reflect a 15-day extension of time granted in Change Order No. 3.

On December 5, 1961, the contracting officer determined, by projecting the work completed as of that date against the revised progress chart, that the plaintiff was 18 percent behind schedule on an overall basis and was 50 percent behind schedule on the concrete work in the

basin. Two days later, on December 7, 1961, the contracting officer invoked paragraph GC-09 of the general conditions of the contract and directed that the plaintiff work around-the-clock thereafter. Previously, the plaintiff was generally working a 5-day week, with a main day shift of 8 hours, a swing-shift, and a graveyard shift for maintenance.

The plaintiff contended that if the progress chart, as revised in October and November of 1961, had been further revised to take into account the extensions of time to which the plaintiff was entitled (according to the plaintiff's contentions, as summarized in parts II-V of this opinion), the plaintiff was actually on schedule in early December 1961 and, accordingly, that the contracting officer's directive for around-the-clock work was an acceleration order which entitled the plaintiff, under the "changes" provision of the contract, to an equitable adjustment covering all the additional costs resulting from the acceleration.

The contracting officer did not make any separate findings or render any separate decision on the plaintiff's "acceleration" claim. However, the contracting officer did deny the plaintiff's claims for extensions of time on which the "acceleration" claim was based.

In the report which the hearing examiner made on the plaintiff's appeals to the Commission, the hearing examiner said that the contracting officer's calculations did not take into account certain time extensions which should have been granted prior to the time when the "acceleration" order was issued, *i.e.*, 31 days in connection with the plaintiff's "access" claim, at least 60 days in Change Order No. 2 (rather than the 30-day extension actually granted in that order), 12 days for lack of steam, and 10 days on account of unusually severe

weather. The hearing examiner further said that if the additional time extentions to which the plaintiff was entitled as of early December 1961 were taken into account, the plaintiff was well ahead of schedule in the performance of the work under the contract as of December 7, 1961. Accordingly, the hearing examiner concluded that the contracting officer's directive of December 7 for around-the-clock work was a change order for acceleration which entitled the plaintiff to an equitable adjustment upward in the contract price to compensate the plaintiff for the extra expense resulting from the acceleration. The hearing examiner did not attempt to compute the amount of the plaintiff's extra expense flowing from the acceleration order.

The Commission did not specifically discuss the plaintiff's "acceleration" claim, as such, in the Commission's memorandum and order dated November 14, 1963, or in the Commission's decision dated May 13, 1964. It is reasonable to infer, therefore, that the Commission accepted the part of the hearing examiner's report dealing with the "acceleration" claim.

Accordingly, the "acceleration" claim is to be regarded as having been included within the scope of the Commission's action in remanding the entire proceeding to the contracting officer with a directive "to effect promptly equitable adjustments and payments to which the appellant [plaintiff] is entitled," and indicating that in the event of a disagreement concerning a particular adjustment or payment, "the contracting officer will make a determination pursuant to the disputes clause of the contract, subject to appeal."

As stated heretofore in connection with other claims, the purpose of the remand was never accomplished.

VII. THE "BACKFILL" CLAIM

Subparagraph (h) of paragraph TP-04 of the contract specifications provided in part as follows:

> (h) *Moisture Control:* The maximum allowable moisture content of unplaced fill material shall be 20% of the dry weight of the material. Whenever the moisture content of material exceeds this limit, dry the material to acceptable moisture content before depositing. Whenever moisture content of placed material is raised, by rain or otherwise, above the specified limit, suspend compaction operations until fill has dried to acceptable moisture content. * * *

When the plaintiff finished laying the slabs of the concrete basin about the middle of October 1961, it backfilled to the level of the slabs, using for this purpose fill material taken from the spoil pile resulting from the operations of Nelson Bros., the separate excavation contractor. Later, the contracting officer ordered the backfill removed and replaced.

A claim submitted by the plaintiff under the "changes" provision of the contract was denied by the contracting officer; the plaintiff appealed to the Commission under the "disputes" provision of the contract; and the Commission referred the matter to the hearing examiner previously mentioned.

The hearing examiner found as a fact that when the backfill was initially put in place, it was approved by a Government inspector as having a proper moisture content; that when the work was delayed for reasons previously discussed in this opinion, the fill became waterlogged and frozen; that the fill was then reinspected; and that the plaintiff was required to remove it and replace it

from a source other than the Nelson Bros. spoil pile, which in the meantime had become unsuitable for use as fill because of excessive moisture. The hearing examiner concluded that the contracting officer's directive that the fill (which had been proper when installed) be removed, and the related directive to the effect that such fill should be replaced with material from a source other than the Nelson Bros. spoil pile, were constructive change orders which entitled the plaintiff to an equitable adjustment. The hearing examiner did not compute the amount due the plaintiff because of these constructive changes.

The Commission did not discuss the merits of the plaintiff's "backfill" claim in its memorandum and order of November 14, 1963, or in its decision of May 13, 1964. It is inferred, therefore, that the portion of the hearing examiner's report dealing with this claim was accepted by the Commission, and, accordingly, that this claim was within the scope of the Commission's action in remanding the entire proceeding to the contracting officer "to effect promptly equitable adjustments and payments to which the appellant [plaintiff] is entitled," and with an instruction that in the event of a disagreement concerning the adjustment or payment on a particular claim, the contracting officer should "make a determination pursuant to the disputes clause of the contract, subject to appeal."

The plaintiff's "backfill" claim, like the other claims previously discussed in this opinion, was never processed to a final conclusion by the administrative agency.

VIII. THE "RETAINAGE" CLAIM

In the proceedings before the hearing examiner, the plaintiff contended that the contracting officer was

retaining a total of $92,794.70 which the contracting officer had determined was due the plaintiff under change orders issued during the course of the work under the contract; that the sum of $8,000 otherwise due the plaintiff under the contract was being retained by the contracting officer against the possibility that the Government might be held liable to another contractor for delay in making the concrete basin (which the plaintiff constructed) available to such contractor for the performance of work under a contract other than the one involved here; and that the contracting officer was retaining the sum of $22,280 on the ground that the plaintiff owed such amount to a supplier of aggregate that was used in the performance of the contract.

With respect to the amounts previously found by the contracting officer to be due under change orders, the hearing examiner stated in his report that "all payments withheld for work under change orders are now due and payable."

In connection with the $8,000 allegedly withheld because of the possibility that the Government might subsequently be held liable to another contractor, the hearing examiner stated in part as follows:

> * * * *If this is the case,* this money should be paid now. It is elemental that the contracting officer has no authority to prejudge a law suit and assess damages. * * * [Emphasis supplied.]

With regard to the plaintiff's allegation relative to the withholding of $22,280 on the ground that the plaintiff had failed to pay the full amount due a supplier of aggregate, the hearing examiner stated in part as follows:

> * * * *If this is true*, this amount should be paid now for the same reason. [Emphasis supplied.]

Summing up his discussions concerning the plaintiff's "retainage" claim, the hearing examiner stated in part as follows:

> * * * Finally, *if the appellant's [plaintiff's] assertions are correct*, it appears that approximately $124,000.00 is now withheld, which under this decision is due and owing. Whatever the amount is, and it is a matter of arithmetical computation, it should be paid forthwith. * * * [Emphasis supplied.]

In its memorandum and order dated November 14, 1963, the Commission stated that it left "undisturbed" the portion of the hearing examiner's report dealing with the plaintiff's "retainage" claim.

The petition in the present case refers to "the retainage amounting to approximately One Hundred Twenty-Four Thousand Dollars ($124,000.00) which has never been paid." However, in the brief supporting its motion for summary judgment, the plaintiff states with respect to the "retainage" claim that there is no issue involved here which has to be decided by the court at this time, since the plaintiff's motion for summary judgment seeks only a review of the administrative decisions, and a judicial determination of the defendant's liability, on the other claims asserted by the plaintiff.

In connection with the "retainage" claim, perhaps it should be mentioned that, according to information received from the parties, the amounts determined by the contracting officer to be due under change orders have been paid to the plaintiff during the pendency of the present litigation.

With respect to the other items of $8,000 and $22,280 allegedly retained by the contracting officer, it will be noted that the pronouncements by the hearing examiner (which were left "undisturbed" by the Commission) did not constitute unequivocal administrative decisions of the sort that can appropriately be subjected to judicial review. Hence, as the plaintiff indicates in its brief, these particular matters are outside the scope of the present review proceedings.

IX. ACTION BY GENERAL ACCOUNTING OFFICE

In its memorandum and order dated November 14, 1963, the Commission directed the contracting officer "to effect promptly equitable adjustments and payments to which the appellant [plaintiff] is entitled."

Subsequently, on March 4, 1964, a certifying officer in the employ of the Commission requested advice from the General Accounting Office ("GAO") with respect to the certification of a voucher for the making of a payment in the amount of $32,297.73 to the plaintiff under the contract. The amount set out in the voucher was said to represent three sums withheld from the plaintiff, *i.e.*, $22,280 withheld because the plaintiff allegedly owed such amount to a supplier of aggregate, $8,366.19 withheld because of the Government's possible liability to another contractor, and $1,651.54 withheld because of an alleged indebtedness by the plaintiff to still another contractor for telephone services.

It will be noted that the voucher which the certifying officer submitted to the GAO for advice covered two of the items that had been involved in the plaintiff's "retainage" claim before the hearing examiner and the Commission (although there was a variance in the amount of one of these items), but it did not cover any

proposed payment on any of the seven claims that are involved in the present review proceedings.

On December 5, 1966, the GAO advised the certifying officer in decision No. B-153841 (46 Comp. Gen. 441) that it would be improper to certify the voucher which had been submitted to the GAO, because (according to the GAO) the plaintiff did not have a valid claim for any additional compensation under the contract.

The GAO reviewed at great length the hearing examiner's report and the Commission's actions on all of the plaintiff's claims, including the "access," "concrete," "steam," "weather," "acceleration;" and "backfill" claims, which are summarized in parts II-VII of this opinion. The GAO expressed the opinion that the administrative decisions favorable to the plaintiff in connection with these claims were not supported by substantial evidence.

Relying on the opinion expressed by the GAO, the Commission thereafter refused to take any further action on the plaintiff's claims. As a consequence, the plaintiff has never received the administrative relief which, according to the Commission's decisions, the plaintiff was entitled to receive on the claims described in parts II-VII of this opinion.[1]

As the Supreme Court has said, respect should be accorded "the parties' rights to contract and to provide for their own remedies." *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429 (1966). In the contract

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[1] As indicated elsewhere, it appears that part of the "retainage" claim—*i.e.*, the item relating to amounts found by the contracting officer to be due under change orders—has been paid during the pendency of the present litigation.

that is before the court for consideration at the present time, the parties provided in pertinent part as follows with respect to the resolution of disputes that might arise under the contract:

> (a) * * * [A]ny dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor [plaintiff]. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission * * * shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. * * *
>
> (b) This "Disputes" Clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

It will be noted that the plaintiff and the contracting officer provided in the contract that if they could not reach an agreement on a dispute concerning a question of fact arising under the contract, the dispute

was to be decided by the contracting officer (notwithstanding his interest as one of the parties to the contract), and that his decision was to be final and conclusive unless *the plaintiff* appealed in writing to the Commission within 30 days. Obviously, the contracting officer would be in agreement with his own decision; and if the plaintiff did not indicate disagreement with such decision within a 30-day period, it was to be finally and conclusively established that the plaintiff was in agreement with the contracting officer's decision, so that the situation at the end of the 30-day period would be one wherein both parties had reached an agreement on a matter which initially constituted a controversy between them.

Similarly, the plaintiff and the contracting officer provided in the contract that in the event of an appeal *by the plaintiff* to the Commission from a decision by the contracting officer, the decision of the Commission was to be final and conclusive "unless determined by a court of competent jurisdiction" to be invalid. Here, again, the Commission would obviously be in agreement with its own decision; and if the plaintiff was in disagreement with such decision, it was encumbent upon the plaintiff to go to a court of competent jurisdiction and attempt to have the Commission's decision overturned. In the absence of an attempt by the plaintiff to obtain judicial relief, it was to be finally and conclusively established that the plaintiff was in agreement with the Commission's decision, which would then constitute a mutually satisfactory solution of a onetime controversy and would be binding on both parties.

It would be wholly unreasonable to suppose that the plaintiff, when it agreed to the inclusion of the "disputes" provision in the contract, intended to agree that the Commission, after having made decisions favorable to the plaintiff at the conclusion of quasi-judicial

proceedings under the "disputes" provision, could then repudiate its own decisions, as was done by the Commission in the present case. On the contrary, the action of the Commission in repudiating its own decisions made under the "disputes" provision of the contract must be regarded as a breach of that provision.[2]

The Commission's purported justification for its refusal to carry out its own decisions made under the "disputes" provision of the contract on the plaintiff's claims discussed in parts II-VII of this opinion was, of course, the opinion expressed by the GAO in its decision No. B-153841. That was too slender a reed, however, to support the Commission's repudiation of its own decisions.

With respect to the action of the GAO in reviewing the administrative decisions rendered under the "disputes" provision of the contract on the plaintiff's "access," "concrete," "steam," "weather," "acceleration," and "backfill" claims, it must be noted that the parties had contracted for a judicial review of such decisions in appropriate instances, and not for a review by the GAO.

In this connection, it is of more than passing interest that when the matter of proposed legislation to correct the situation resulting from the Supreme Court's decision in *United States* v. *Wunderlich*, 342 U.S. 98 (1951), was under consideration, the GAO suggested to Congress that such legislation should expressly authorize the GAO to invalidate decisions rendered by contracting

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[2] It should be mentioned in this connection that the record is wholly devoid of any indication that the administrative decisions favorable to the plaintiff were tainted by fraud or overreaching, or that the Commission lacked statutory authority to effectuate its decisions.

agencies under the "disputes" provisions of Government contracts if the GAO should find such decisions to be "fraudulant, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence."[3] However, this suggestion was objected to by contracting agencies of the Government and also by persons engaged in the business of contracting with the Government,[4] and the proposal was ultimately rejected by Congress. It was stated in the House report on the bill[5] which Congress eventually enacted as the so-called Wunderlich Act (41 U.S.C. §§ 321-22) that "there is no intention of setting up the General Accounting Office as a 'court of claims.'" H.R. REP NO. 1380, 83d Cong., 2d Sess., p. 7 (1954).

The House report cited at the end of the preceding paragraph further said (pp. 6-7) that the proposed legislation would not "add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit * * *." It is pertinent, therefore, to consider the question of the jurisdiction which the GAO had prior to the enactment of the Wunderlich Act to review, "in the course of a settlement or upon audit," administrative decisions rendered under the "disputes" provisions of Government contracts.

Another court which had occasion to pass upon the question mentioned in the last sentence of the preceding

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[3] H.R. 1839, 83d Cong., 1st Sess., which represented the views of the GAO as to appropriate corrective legislation.

[4] See *Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H.R. 1839, S.24, H.R. 3634, and H.R. 6946*, 83d Cong., 1st and 2d Sess., ser. 12 (1954).

[5] S.24, 83d Cong.

paragraph reached the following conclusion with respect to it:

> The powers of the Comptroller General are extensive and broad. But he does not, *absent fraud or overreaching*, have authority to determine the propriety of contract payments when the contracts themselves vest the final power of determination in the contracting executive department. * * * [*James Graham Mfg. Co.* v. *United States*, 91 F. Supp. 715, 716 (N.D. Calif. 1950). Emphasis supplied.]

In its decision No. B-153841, the GAO referred (46 Comp. Gen. at page 453) to several statutory provisions as supposedly empowering the GAO to review the administrative decisions with which we are concerned in disposing of the present cross-motions for summary judgment.

For example, the GAO referred to 31 U.S.C. § 74, which authorizes disbursing officers or the heads of governmental agencies to apply to the Comptroller General for "his decision upon any question involving a payment to be made by them or under them," and to 31 U.S.C. § 82d, which authorizes certifying officers "to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification." In the present case, the submission to the GAO was by a certifying officer, it was acknowledged by the GAO (46 Comp. Gen. at p. 446) as having been made under 31 U.S.C. § 82d (*i.e.*, as seeking advice on questions of law), and it presented a voucher which involved the proposed payment of three items totaling $32,297.73 and which did not include any proposed payment to the plaintiff on any of the seven claims that are now under consideration. Therefore, except for matters of law

relating to the payment of the three items in the voucher, the extensive discussion contained in the GAO's decision No. B-153841 was beyond the scope of the GAO's authority under 31 U.S.C. § 82d.

The GAO also referred to 31 U.S.C. § 71, which provides in part that "All claims and demands whatever * * * [against] the Government of the United States * * * shall be settled and adjusted in the General Accounting Office." This provision presupposes the submission directly to the GAO of claims and demands by persons asserting them against the Government—or the referral to the GAO by governmental agencies of claims and demands previously submitted to them—under circumstances where the submission or referral does not violate a contractual agreement between the claimant and the Government for another method of disposing of the claim. It certainly does not authorize the GAO to nullify the "disputes" provisions of Government contracts by preempting, on its own initiative, claims as to which the parties have contracted for a quasi-judicial procedure, to be followed by judicial review in appropriate instances.

In addition, the GAO mentioned its authority under 31 U.S.C. § 71 to settle and adjust "all accounts whatever in which the Government of the United States is concerned," and said that under 31 U.S.C. § 44 and 31 U.S.C. § 2 (note) it is authorized to examine and audit the financial transactions of the Government. However, the pronouncements by the GAO concerning the administrative decisions on the plaintiff's claims discussed in parts II-VII of this opinion were not related to the settlement and adjustment of the Government's accounts, or to the auditing of the Government's financial transactions.

The conclusion seems inescapable that the GAO, in making the pronouncements concerning the supposed

impropriety of the administrative decisions rendered under the disputes provision of the contract on the plaintiff's "access," "concrete," "steam," "weather," "acceleration," and "backfill" claims, was acting beyond the scope of its statutory authority and, in effect, was endeavoring on its own initiative to exercise a review function which the parties, in the contract, had reserved for the courts in appropriate instances.

It is not necessary in this case to determine the proper scope of the GAO's review if that agency were properly called upon, in the performance of its statutory functions, to review payments made or proposed pursuant to administrative decisions rendered under the "disputes" provision of the contract with which we are concerned. In this connection, however, it is pertinent to note again that in the "disputes" provision of this contract, the parties expressly contracted for the finality of appellate decisions rendered by the Commission on disputes concerning questions of fact, "unless determined *by a court of competent jurisdiction* to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence" (emphasis supplied). The parties evidently intended that the invalidation of administrative decisions on factual issues, rendered at the conclusion of quasi-judicial proceedings, should be surrounded by the due-process safeguards available only in the courts.

For the reasons previously stated in this part of the opinion, the pronouncements by the GAO did not provide any justification for the Commission's refusal to carry out the administrative decisions favorable to the plaintiff rendered under the "disputes" provision of the contract on the claims discussed in parts II-VII of this opinion, and such unwarranted refusal must be regarded

as a breach by the Commission of its contractual obligations.[6]

X. FUTURE PROCEDURE

A period of more than 5 years has elapsed since the Commission rendered its final decision of May 13, 1964, on the claims that are involved in the present review proceedings. Although the administrative determinations on such claims were favorable to the plaintiff, the latter has never received the relief which, according to the Commission, the plaintiff was entitled to receive on the claims now under consideration.

Consequently, we have here a case where the administrative procedure under the "disputes" provision of a Government contract has proved to be "inadequate" or "unavailable" for the final disposition of claims submitted by the contractor. This being so, the court may properly proceed—and should proceed—with the holding of a trial *de novo* in order finally to dispose of these claims without further undue delay by determining the amounts which the plaintiff is justly entitled to receive on such claims. See *United States* v. *Anthony Grace & Sons, Inc., supra*, 384 U.S. at pp. 429-30.

RECOMMENDED CONCLUSION OF LAW

Upon the foregoing opinion, which is adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover on its "access," "concrete," "steam," "weather," "acceleration," and "backfill" claims, and judgment is entered to that effect. The plaintiff's motion

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[6] See footnote 2.

for summary judgment is allowed as to such claims, and the defendant's cross-motion for summary judgment is denied. The amount of the recovery will be determined in subsequent proceedings under Rule 131 (c), which will be combined with proceedings for the determination of the defendant's liability and the amount of the recovery (if any) on the plaintiff's "retainage" claim.

APPENDIX C

To M. A. Palmeter, Atomic Energy Commission, December 5, 1966:

We refer to your letter of March 6, 1964, in which you request a decision as to whether an attached Standard Form 1166, Voucher and Schedule of Payments, No. 64-274, may be certified for payment. Your request for a decision is made in accordance with the provisions of 31 U.S.C. 82d.

The voucher relates to a decision (S&E Contractors, Inc., Docket Nos. CA-161 and 162, issued on June 26, 1963) by Mr. E. Riggs McConnel, Hearing Examiner, which was reviewed by the Commission under procedures applicable to the determination of disputes arising under Atomic Energy Commission (AEC) contracts. The total amount of the voucher is $32,297.73 and represents sums withheld from payment by the contracting officer under contract AT(30-3)-790 (hereafter "contract 790"), with S&E Contractors, Inc., payment of which has been directed by the decision referred to.

Specifically the voucher lists three items: (1) $22,280 representing the amount allegedly owed by S&E to an AEC cost-type contractor for material furnished for contract 790 and which the cost-type contractor assigned to the AEC by instrument dated June 26, 1962; (2) $1,651.54 which represents the amount allegedly owed by S&E to an AEC cost-type contractor for telephone services furnished by an AEC cost-type contractor for performance of work under contract 790 and which the cost-type contractor assigned to the AEC by an instrument effective as of September 5, 1962; and (3) $8,366.19 which, according to the contracting officer, represents an alleged debt due by S&E to the AEC as damages under contract 790 on the basis that S&E's delay in completing its contract rendered the Government liable for damages to another contractor to whom

the site was to have been made available at an earlier date. Items 1 and 3 were considered by the Hearing Examiner in the above cited decision and he concluded that such withheld amounts should be paid forthwith.

In regard to the third item in the voucher your letter of March 6 relates the following information:

> With respect to the $8,366.19 item, previously mentioned, on the matter of Contractor default at the time of performing its obligations under Contract No. AT(30-3)-790, the following related and significant aspects should be considered inasmuch as the Contractor has submitted a claim against the Government in which he is asking for $2,127,291 of additional costs.
>
> The Contracting Officer, during the performance of the contract, desired to make certain changes in the drawings and specifications that would increase the amount due under the contract and the time required for its performance. The Contracting Officer, not wishing to avail himself of his unilateral rights under the Changes article, requested a proposal from the Contractor which it submitted by letter dated September 27, 1961, in which it asked for a net increase of $145,704 and proposed that the attendant time additive be negotiated at a later date. The Contracting Officer informed the Contractor its quotation was unacceptable, whereupon the parties apparently entered into negotiation to reach acceptable terms. It appears the parties succeeded. The Contractor thereupon submitted its revised proposal dated October 2, 1961, followed the next day by the Government's Change Order No. 2, which

accepted the substantive terms proposed by the Contractor and made stipulated changes in the drawings and specifications. Subsequently, on October 27, 1961, the Contracting Officer forwarded to the Contractor for signature a document entitled Amendment No. 1 which embodied Change Order No. 2 and a previous change order. The Contractor apparently did not communicate again with the Contracting Officer regarding Amendment No. 1 until it sent the Contracting Offficer its letter dated November 24, 1961, which requested either a revised Change Order for $139,807 and a 60 day time extension or for the Contracting Officer to handle the Change Order on a unilateral basis and use the Government estimate for pay purposes for the changes.

The particular items as to whether payments based thereon would be lawful obligations of the Government are:

1. Was Change Order No. 2 a binding contract?

2. Was it proper to allow time and the amount of time allowed for the alleged breach of the Government's obligation to furnish steam?

3. Was the legal standard used in computing the amount of time allowed for "weather" proper?

Your letter also questions whether it was proper for the Hearing Examiner to allow S&E 31 days for alleged suspensions of work during the first part of the contract performance. At the time of your letter this question had not yet been resolved by the Commission which had

the matter before it for review upon appeal by the contracting officer from the Hearing Examiner's decision.

The questions presented by your submission arose from the following transactions:

On May 15, 1961, the AEC issued an invitation for bids for construction of an enclosed testing basin at a site in the State of Idaho. Specifications accompanying the invitation for bids called for construction of a test plant building 320 feet long, 112 feet wide and 65 feet high, and a reinforced concrete basin within the building measuring 250 feet long, 45 feet wide and 36 feet deep. The building was to made of structural steel with aluminum siding and composition roof. Concrete walls in the basin were to be reinforced by massive counterforts in order to withstand the water pressure when the basin was filled. The specifications also called for the extension of steam, water, power, telephone and fire alarm utilities to the building from existing services; the erection and test of two 100 ton, 100 foot span Government-furnished bridge cranes within the building; and the extension of a railroad spur from a point approximately 100 feet outside the building to within the building. Piping, plumbing, heating and ventilation were to be provided. Backfill was to be put in place and compacted as the work on the basin progressed so that when finished the basin would be completely flush with the ground. By the terms of the invitation for bids the entire project was to be completed within 180 days after the notice to proceed.

Excavation of the site had been previously contracted for with Nelson Bros. Construction Company of Salt Lake City and was nearing completion. Bids were opened on June 20, 1961. Four bids were received, ranging from a low bid of $1,272,000 by S&E Contractors to a high bid of $1,413,600. Sixty days after the

date of opening, unless otherwise stated by the bidder, were allowed for award of a contract. S&E did not restrict this time in its bid, and neither S&E nor any other bidder excepted to the invitation requirement that the contract work be completed 180 days after receipt of notice to proceed.

Because of delays in the performance of the excavation for the basin, due to unforeseen subsurface conditions, it appeared that it would not be possible for the construction contractor to be given full access to the project site until about the end of August 1961. The low bidder, S&E, was therefore requested to confer with the contracting officials concerning the effect of this delay, and a conference was held on August 2, 1961, as a result of which S&E and the contracting officer executed a "Memorandum of Understanding" dated August 2, 1961, which recited the above facts, that unlimited access to the basin foundation might not be granted before September 10, and that the contracting officer intended "to release the basin foundation for work by the contractor in sections as it is completed." S&E agreed that, should it be awarded the contract and should unlimited access to the basin foundation be granted on or before September 10, 1961, "no change in completion time or contract price will result from either the award of this contract at any time within 60 days of June 20, 1961, or from the issuance of partial notice to proceed and possible joint occupancy prior to September 10, 1961, with the understanding that S&E Contractors, Inc., will be allowed to proceed with all work in the major portion of the westerly half of the building."

In accordance with this agreement, the contract was awarded to S&E on August 4 and on August 10 a notice was issued to the contractor "to proceed with all work in the major portion of the westerly half of the building." By telegram dated September 10 the contractor

was granted "unlimited access to the test plant basin foundation" and "notified to proceed with all work under the subject contract."

During performance of the work several change orders were issued, two of which included extensions of 30 and 15 days, respectively, in the time for performance, making a total performance time of 225 days from the date of receipt of notice to proceed. The work was completed and accepted on June 29, 1962, or 323 days after the initial notice of August 10, 1961.

By various letters written during the winter and spring of 1962 the contractor presented a number of claims for extensions of time for alleged excusable delays, and a claim for additional compensation of $1,415,467.05 based on the difference between alleged "actual costs" of $2,695,177.18 (including overhead and profit) and "reasonable cost of original work" of $1,272,000 (the amount of the contractor's accepted bid).

The contracting officer rendered his decision on August 8, 1962. The decision discussed and analyzed S&E's claims at considerable length and for the reasons stated therein, which we need not go into at this point, he denied most of them, concluding as follows:

> 1. The contractor's claim for contract time extension based on the Contractor's contention that the contract performance time did not begin until September 10, 1961, is denied.
>
> 2. To reflect an equitable adjustment of the contract price resulting from the issuance of all of the change orders issued pursuant to the provisions of Clause 3 of the General Provisions of the contract, the contract price should be, and it hereby is, increased by

$92,794.70 from $1,272,000 to $1,364,794.70. To reflect an equitable adjustment of the contract performance time resulting from the issuance of said change orders, said contract performance time should be, and it hereby is, extended by 45 calendar days from 180 calendar days to 225 calendar days.

3. To compensate for the delay caused by the strike of laborers, which began on January 12, 1962, and ended on January 19, 1962, the contract performance time should be, and it hereby is extended by 7 calendar days from 225 calendar days (see paragraph 2, above) to 232 calendar days.

4. To compensate for the delay caused by the strike of carpenters, which began on March 14, 1962, and ended on March 15, 1962, the contract performance time should be, and it hereby is, extended by 2 calendar days from 232 calendar days (see paragraph 3, above) to 234 calendar days.

5. The contractor's claim for contract time extension based on availability of Government-furnished steam, is denied.

6. The contractor's claim for contract time extension based on allegations of delay in the performance of backfill operations, is denied.

7. The contractor's claim for contract time extension based on allegations of unusually severe weather conditions is allowed only to the extent that the contract time is

extended by 4 calendar days from 234 calendar days (see paragraphs 2 and 3 above) to 238 calendar days. As adjusted by this and the foregoing provisions of this decision, the contract required completion of all work thereunder on or before April 5, 1962.

8. The contractor's claim for contract time extension based on allegations that it was not possible to perform the contract work within the time prescribed by the contract is denied.

9. The contractor's claim for additional compensation in the amount of $1,415,467.05, based on the Contractor's allegations as to the actual costs which it incurred in the performance of the contract work is denied.

S&E filed its notice of appeal from this decision on September 4, 1962. The contractor took issue with all of the contracting officer's findings except those relating to time extension for labor disputes. The appeal was docketed as CA-161. During a prehearing conference on October 19, 1962, S&E requested leave to amend its complaint to include additional claims not covered in the contracting officer's decision of August 8. Some of these claims had never been formally presented to the contracting officer and it was agreed that these claims would be submitted for decision. This was done by letters to the contracting officer sent on October 22, which incorporated by reference several preceding letters. Eight new claims were asserted:

(1) S&E demanded immediate payment of $92,794 which represented the amount found to be due by the contracting officer for the 6 change orders in paragraph 2 of his

August 8 decision. S&E, however, guarded its right to claim more for Change Order No. 2.

(2) S&E asserted that the contracting officer had withheld $8,000 on the ground that S&E's failure to have the basin ready at a certain time gave rise to a cause of action for breach of contract on the part of Electric Boat Company in connection with the timing of its work on the submarine hull installed in the basin. The contractor demanded immediate payment of this amount, contending that the contracting officer had no power to assess unliquidated damages.

(3) S&E demanded immediate payment of $22,280 which was withheld by the contracting officer on the basis that S&E owed this amount to H.K. Ferguson & Co. (an AEC cost-type contractor) for aggregate material furnished S&E.

(4) The contracting officer had withheld $1,272 from the price of the original contract under his authority to withhold 10 percent of payment as the work progressed. S&E demanded immediate payment of this amount, less $100 to keep the contract open.

(5) S&E claimed an equitable adjustment in the amount of $2,323.75 for certain work on the foundation of column line B.

(6) The sum of $1,322.24 was claimed for the costs of shifting from the pile of aggregate which was provided by the Government to a new pile, when the aggregate used was found by the Government to be inadequate.

(7) The sum of $3,197.65 was claimed for repairs and modification work on the crane over and above that required by the contract.

(8) An equitable adjustment was claimed for putting felt in the ventilators which were installed for air conditioning purposes.

On November 8, 1962, the contracting officer allowed the sum of $1,954.41 for extra work on the foundation of column line B but denied all of the other claims. S&E filed a notice of appeal from this decision on November 23, 1962, which was docketed as CA-162. The two appeals were consolidated and hearings were held before the Hearing Examiner in Idaho and Washington, D.C., during the months of December 1962 and January 1963. The Hearing Examiner rendered a decision on June 26, 1963, in which he sustained the appeal of S&E on most of its major claims.

The unresolved claims in the two appeals were grouped for treatment by the Hearing Examiner as follows:

1. Time for Commencement of Performance
2. Change Order No. 2
3. Non-availability of Steam
4. Extensions for Weather
5. Acceleration
6. Backfill
7. Miscellaneous Claims
   a. Column line B
   b. Change in connection with aggregate
   c. Work on crane
   d. Felting of dampers
8. Impossibility of Performance at Outset

9. Monies withheld and mode of settlement, if any, will be discussed briefly, in the conclusion.

The Hearing Examiner held that the contractor was entitled to equitable adjustments under Nos. 1, 2, 3, 4, 5, 6 and 7(d) of the above claims. Claims 7(b), 7(c) and 8 were denied, and 7(a) was held to involve merely a question of quantum, which was not considered on the appeal. Under 9 he held that the net amount of $92,794.70 due under the several change orders as issued by the contracting officer should be paid immediately, together with any amounts being withheld to cover the Government's possible liability to Electric Boat and the claim for aggregate furnished by H. K. Ferguson, these being two of the three items included in the voucher forwarded with your submission. No reference was made to the third item.

Having excluded the question of amount from his consideration at the outset of the hearing, the Examiner made no findings with respect thereto, but ordered that the parties proceed without delay to "negotiate" a final settlement in accordance with the decision.

On July 10, 1963, the contracting officer presented a motion to the Atomic Energy Commission to extend the time to petition for review of the Hearing Examiner's decision. This motion was granted by Commission Order dated July 12, 1963. By petition dated July 30, 1963, with supporting brief attached, the contracting officer requested that the Commission review the Examiner's decision. On November 14, 1963, the Commission in a *Memorandum and Order* granted the contracting officer's petition for review with respect to four issues only. They were listed as follows:

a. Alleged arithmetical error in the summation of delays attributable to unusually

severe weather and failure of the Government to furnish steam for curing concrete on the basis of the hearing examiner's specific findings of such delays before and after December 7, 1961;

b. The propriety of the hearing examiner's decision that an equitable adjustment of costs and of the 180 day period of performance specified in the contract is to be allowed on account of delay from August 10, 1961, to September 10, 1961, in making the site available to S&E Contractors, Inc.;

c. The propriety of the hearing examiner's conclusion that, under the terms of the contract, the contractor was not required to install felting on the blades of the dampers of the ventilating units installed, and that the contractor is entitled to additional compensation for the installation of such felting;

d. The propriety of the hearing examiner's admission in evidence of a telegram from Trane Manufacturing Co. to S&E Contractors, Inc., dated June 6, 1962, dealing with the necessity and desirability of installing felting on the blades of the ventilating units.

The petition of the contracting officer for review of the decision in all other respects was denied. However, pending the ultimate determination of the appeal, the Commission deleted the last paragraph of the Examiner's decision and substituted in lieu thereof the following:

It is ordered That the appeal is sustained; the decisions of the contracting officer herein are set aside to the extent set forth in this

> decision; and the contracting officer is directed to effect promptly equitable adjustments and payments to which the appellant is entitled. In the event of disagreement concerning the adjustment or payment, the contracting officer will make a determination pursuant to the disputes clause of the contract, subject to appeal.

On November 25, 1963, the contracting officer petitioned the Commission to reconsider its *Memorandum and Order* of November 14, 1963, on the basis that the Commission should have granted review of the Hearing Examiner's decision *in toto* rather than on only the four issues actually granted. This petition was denied by the Commission on February 11, 1964. However, with respect to the assignments to the AEC of the two claims against S&E by H. K. Ferguson and Phillips Petroleum Company, the Commission held that if at the time of payment which was directed in its order of November 14, 1963, it appeared that there was a lawful claim of the Government against S&E then that fact could be taken into account in making the adjustment.

As noted earlier, your letter of March 6, 1964, was forwarded to our Office by letter of March 27, 1964, from Mr. A. R. Luedecke, General Manager of the AEC. At that time the appeal to the Commission was still pending. The Commission rendered its decision on May 13, 1964, and a copy of this decision was transmitted to our Office by letter dated May 21, 1964, from the Acting Assistant General Manager of the AEC.

In its decision the Commission confined itself to consideration of the last three issues designated in its order of November 14, 1963, since the contracting officer had previously waived his right to file exceptions on the first issue specified. Such waiver was based on the

ground that the interests of the Government would not be served by seeking a modification limited only to *arithmetical errors* in the computation of delays attributable to unusually severe weather and failure to furnish steam.

Upon this limited review, the Commission reversed the Hearing Examiner's decision that the contractor was entitled to adjustment for the full 31-day period from August 10 to September 10, 1961, ruling that there should be deducted from that period of time such part of it as was in fact usefully occupied by the contractor, but leaving that for determination as a part of the final settlement negotiations. The Commission also reversed the Examiner's allowance of claim 7(d), and modified the Final Order of the Examiner as above noted.

It is our understanding that payment has been made of the entire balance of the original contract price, as modified by the several change orders, less the amount covered by the voucher submitted by your letter of March 6, 1964.

The question initially presented by your submission is, therefore, whether the Hearing Examiner's decision (to the extent that it has been affirmed by the Commission) that the Government's withholding of the voucher items is improper, and that the amount thereof should be paid forthwith, is a final and conclusive adjudication which would preclude any exception by our Office to a payment made in obedience thereto. Since the decision in that respect involves primarily and essentially a question of law, we have no hesitancy in concluding that the decision in that respect does not bind this Office, and that we must therefore determine whether the decision is correct. In making that determination we recognize and acknowledge that under the stipulation of the Disputes

clause of the contract and the provisions of the "Wunderlich" act of May 11, 1954, 68 Stat. 81 (41 U.S.C. 321-322) we must accept as conclusive the decision of the Commission and its authorized representative, as to disputes of fact, unless such decision is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

In order to enable us to make this determination we requested, and the Commission furnished, the complete record of the appeal proceedings (with the exception of certain exhibits hereinafter referred to). Believing that our responsibility for the settlement of all claims against the Government and for the auditing of the financial transactions of the administrative agencies of the Government would not justify us in sanctioning, even by silence, the payment of any claim which was brought to our attention and to which we would feel bound to take exception in our subsequent audit, we reviewed the entire record, not only with respect to the particular items involved in the voucher submitted but also with respect to all of the claims considered.

Upon our initial review of the record we reached certain tentative conclusions which were set forth in detail in a document. Upon the request of S&E's attorneys that they be permitted to review and file a reply brief commenting in detail thereon, a copy of this document was forwarded to S&E in care of its attorneys with instructions that the reply brief be limited to the record made before the Hearing Examiner, since we would not consider any new matter not previously received as evidence by the Examiner. Since the contracting officer and the Atomic Energy Commission also had an interest in the outcome of any decision our Office might reach, copies of the document were furnished to them by letter

of February 26, 1965, with similar instructions to limit all comments to the record made before the Examiner.

By letter of April 23, 1965, the contracting officer's attorney submitted a comprehensive (53 page) legal brief commenting on various facets of our draft document. By letter dated June 1, 1965, the attorneys for S&E submitted their legal brief. This brief was also comprehensive (51 pages) and commented in detail on the initial conclusions contained in the draft document. By letter of August 6, 1965, the Chairman of the AEC advised us that, under the circumstances, he did not believe it would be appropriate or desirable for the Commission to comment on any proposed action by our Office bearing upon the correctness and conclusiveness of the Commission's decision.

Thereafter, at the request of S&E's attorneys conferences were held in our Office on April 15 and 20, 1966, at which time the various issues in the Examiner's decision were discussed in considerable detail. At the conclusion of the April 20 conference a request was made that S&E be allowed to submit an additional brief which would be primarily directed at showing what items in evidence before the Examiner would constitute "substantial evidence" in support of the Examiner's decision. This brief was submitted on July 20, 1966.

Our decision in this case has been reached after a full and careful consideration of the briefs submitted by the attorneys for S&E and by the contracting officer's attorney. However, before we turn to an examination of the Hearing Examiner's decision, we should like to comment upon a basic question raised in S&E's briefs of June 1, 1965 and July 20, 1966, concerning the authority and jurisdiction of our Office to review the Examiner's decision as modified by the Commission.

S&E's brief of June 1, 1965, takes the position that the injection of our Office into a proceeding of this nature where the terms pertaining to settlement of disputes arising under a Government contract have been fully complied with by both the contractor and the Government agency, and where further recourse lies for both in the courts, is entirely improper. As such, S&E states, it constitutes a breach of the contract by the United States, it is an unwarranted attempt to usurp power granted by law and contract to the AEC, and it injects our Office into a proceeding in which our Office has no position.

In support of these statements, S&E points out that an orderly procedure has been established and substantial tentative finality has been attached to factual determinations in administrative proceedings of this nature, by the Disputes clause of the contract, the Wunderlich Act, the decision in *United States v. Bianchi*, 373 U.S. 709, and the disputes procedures of the AEC, including a review by the Commission itself. Also, according to S&E, it cannot be said that the injection of our Office into this situation is necessary to protect the Government's interests, since it has been clearly established that under the Wunderlich Act a judicial review is available in the courts to either a contractor or the Government under the holding in *C. J. Langenfelder & Son, Inc. v. United States*, 169 Ct. Cl. 465, 341 F.2d 600 (1965).

S&E contends that our Office in purporting to act under the Budget and Accounting Act, 1921, 31 U.S.C. 41, is proceeding under what is only the "color of authority" and that the true intent of Congress with respect to our functions is that we be involved in the legality of expenditures, but not in disputes clause proceedings. S&E states that any right on our part to be involved in such proceedings cannot be inferred from this

"ancient" statute (i.e. Budget and Accounting Act, 1921) when at a later date, in passing the Wunderlich Act, 41 U.S.C. 321, 322, powers of this nature were sought by our Office and expressly rejected. In support of this contention, S&E cites a statement appearing in H. Rept. No. 1380, 83d Cong., to the effect that objections were raised by the Department of Defense and various defense industries to the inclusion of the Comptroller General in the wording of the act because of the supposed fear that such inclusion would destroy the finality which existed under Defense Department procedures. S&E concedes that the conclusion of the report states that there was no intent to enlarge or change the jurisdiction of our Office; however, it is argued, the subsequent logical evolution of orderly administrative procedures where both sides have a fair opportunity to be heard, subject to judicial review, negatives the concept that our Office has any cognizance over such proceedings.

S&E notes that the United States Supreme Court and our Office have recognized the principle of *United States v. Holpuch*, 328 U.S. 234, to the effect that where a contract provides a fact finding and disputes procedure the same are mandatory on all parties. S&E concludes that:

> * * * It cannot be denied that the Comptroller General has at all times undertaken to maintain some element of jurisdiction in such matters, but historically he has only undertaken to invoke it in extraordinary circumstances involving a situation where there is no other recourse available to the Government. This is not true in the present circumstances, particularly in the light of the recently re-emphasized doctrine of the right of judicial review of a board proceeding.

Most noteworthy, according to S&E, our action in the instant case, while giving lip service to recognizing the limitations on our powers as to the redetermination of the facts, has proposed more than a 200 page draft review. S&E contends that "the right not to be judged, except in an open proceeding where all evidence, witnesses and parties, can be heard, and where your opponent was separated from your judge, is paramount throughout all considerations of appeals and disputes procedure." S&E concludes that by the most favorable interpretation of all the existing law and decisions, the most that could be said is that our Office may have a right to consider solely questions of law pertaining to the disbursement aspect of this case.

In its brief of July 20, 1966, S&E notes that the language of the Disputes clause embodied in the S&E contract states that the decision of the Commission or its duly authorized representative for the determination of appeals shall be final and conclusive unless determined by a "court of competent jurisdiction" to have been fraudulent, or capricious, or arbitrary, etc. Since the General Accounting Office is not a "court of competent jurisdiction" our Office, S&E contends, is without authority to review the Examiner's decision, pointing out that H. Rept. No. 1380, 83 Cong., states in part: "At the same time there is no intention of setting up the General Accounting Office as a 'Court of Claims.' " S&E contends that the exercise of review functions in this case would make the General Accounting Office another Court of Claims. In addition, S&E contends that over the past 12-year period between 1952 through 1964 our published decisions do not indicate that we have ever reviewed administrative findings on questions of fact.

In connection with the jurisdictional questions raised by S&E above, it is noted that your letter

requesting a decision raises questions and issues that go to the very heart of the Hearing Examiner's decision. Many of the issues raised in your request for decision involve legal questions, but these are, at times, so enmeshed with questions of fact that the strict legal questions cannot be readily separated from those of a factual character. In submitting your letter of March 6, 1964, to our Office, the General Manager, in his letter of March 27, 1964, noted that your request for decision was made pursuant to 31 U.S.C. 82d which provides that certifying officers shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification. The General Manager stated that the forwarding of your request should not be construed as a request by the Commission for our review of, or concurrence in, the decision reached under the Commission's procedures for decisions of contract disputes and he added: "You will note that the Certifying Officer states the decision in this case appears to be based primarily on questions of law."

While it is true that the questions decided by the Hearing Examiner were in many cases questions of law, the jurisdiction of this Office to review decisions by contracting Agencies rendered under Disputes clauses of Government contracts is not limited to review of legal questions only, but extends, as well, to review of questions of fact and so-called mixed questions of law and fact.

Under the Budget and Accounting Act, 1921, 42 Stat. 24, 31 U.S.C. 44, and the Budget and Accounting Procedures Act of 1950, 64 Stat. 832, 31 U.S.C. 2 note, the Comptroller General of the United States, as the agent of the Congress, is vested with authority to examine and audit the financial transactions of the Government. Section 305 of the 1921 act, 31 U.S.C. 71, pro-

vides that all claims and demands whatever by or against the Government and all accounts whatever in which the Government is interested, either as debtor or creditor, shall be settled or adjusted in the General Accounting Office. Section 304 of the same act, 31 U.S.C. 74, authorizes disbursing officers, and the heads of departments and establishments, to apply to the Comptroller General for his decision upon any question involving a payment to be made by them or under them. Also, as you know, the provisions of 31 U.S.C. 82d under which you requested a decision in the present case, provide authority to the Comptroller General to render decisions on legal questions involved in vouchers presented for certification.

Under the terms of these statutes it is well established that the legal propriety of payments made by public officers in the transaction of the Government's business is subject to determination by the General Accounting Office and that such payments are not final until settled by the General Accounting Office which may disallow credit in the accounts of the fiscal officers of the Government for disbursements not made in accordance with law. Accordingly, in transactions involving an expenditure of public funds we have regularly reviewed the conditions underlying any payment made pursuant to a contractual agreement and, if it appeared that any payment had been improperly made or that a contractor had been unjustly enriched at the public expense, we have taken whatever action was necessary to recover any amounts improperly paid. In that connection, Section 93, Title 31, U.S. Code, provides that the General Accounting Office shall superintend the recovery of all debts finally certified by it to be due to the United States. See also the provisions of 31 U.S.C. 82a-2(b). Conversely, a contractor who feels that he is entitled to an additional amount under a contract may present a claim to the General Accounting Office

for settlement, regardless of the administrative action taken in the matter.

While we have always recognized that in settling such claims we are bound to accept the administrative determination of the pertinent facts to the extent that such determinations are entitled to finality, we have always reviewed, and sometimes questioned, administrative decisions under the standard "Disputes" clause on the basis of the standards prescribed in the Wunderlich Act, 41 U.S.C. 321, 322. We believe that our jurisdiction to review Disputes clause decisions on such basis, as well as any other administrative determinations, is clearly conferred by the basic settlement and audit authority granted by the Budget and Accounting Act, 1921. In that regard it might be pointed out that the claims settlement provisions of section 305 of the Budget and Accounting Act, 1921, have a long history, being derived from the act of March 3, 1817, 3 Stat. 366. While our claims determinations thereunder have no effect on the rights of contractors to pursue any judicial remedies which may be available to them and are of no binding effect in judicial proceedings, they are binding upon the executive agencies.

In regard to S&E's assertion that our Office is not a "court of competent jurisdiction" within the meaning of that phrase as set forth in the Disputes clause of its contract, we need only note that it is the Wunderlich Act and not the Disputes clause which governs the matter. See *C.J. Langenfelder & Son, Inc. v. United States, supra,* wherein the contractor argued that the literal language of the Disputes clause made an administrative decision in its favor final and conclusive. The contractor argued that this conclusion was strengthened by the fact that the Disputes clause does not set forth any right on the part of the Government to appeal an

adverse decision and sets up no procedure for such appeals. The Court of Claims rejected this argument stating (footnote 7):

> * * * Rather, it is the Wunderlich Act which is determinative. The minimal bounds of judicial review must be drawn from the terms, history, and policy of that act not from policies speculatively drawn from the contract clauses which are themselves governed by the statute.

Other aspects of the Wunderlich Act and the role of our Office thereunder were set forth in the *Langenfelder* case as follows:

> 1. Plaintiff first asserts broadly that a final decision by the head of a department for the contractor is conclusive and cannot be re-examined in any way by this court. The argument is that one who contracts with the Government has virtually no choice concerning the contract's standard terms; not the least restrictive provision is the Disputes Clause setting out a complete arbitral system to which the contractor must submit whenever a controversy arises under the contract; the *quid pro quo* for these restrictions is, in plaintiff's view, that a decision in the contractor's favor at either of the two stages of this imposed arbitral process (by the contracting officer or the department head) may not be challenged by the Government.
>
> Whatever may have been the rule or the practice before the Wunderlich Act, 68 Stat. 81, 41 U.S.C. §§ 321-22, that statue compels us to reject plaintiff's suggestion. It is in effect asking that we read into all government contracts (with Disputes Clauses) the provision

that a claim otherwise properly before the court may not be decided on the merits if there was a prior administrative determination favorable to the contractor, i.e., a clause that administrative determinations for the contractor are automatically conclusive. The standard Disputes Clause does not and cannot now contain such a limitation, because the Wunderlich Act specifically prohibits the inclusion in a government contract of any clause making the decisions of an administrative official on questions of law or fact completely final and free from judicial review, 68 Stat. 81, 41 U.S.C. §§ 321-22. The Act, phrased in universal terms, makes no qualification or exception for administrative orders sustaining the contractor.[7] The opinions which may indicate a

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[7] In an attempt to overcome the impact of the Wunderlich Act, plaintiff emphasizes the part of the Disputes Clause specifying the procedure by which a contractor may appeal an adverse decision by the Contracting Officer, but omitting any corresponding right on the part of the Government. Plaintiff also points to Federal Aviation Agency regulations to the same effect. See 41 C.F.R. §§2-60.3, 2-60.6. By analogy or implication, plaintiff urges, the same policy should govern decisions by the head of the department. But the provisions relied upon by plaintiff do no more than outline the appellate procedure to be followed within the agency. Though they may be crucial when the court is called upon to dismiss a contractor's petition for failure to exhaust administrative remedies, they are irrelevant in the present context. Rather, it is the Wunderlich Act which is determinative. The minimal bounds of judicial review must be drawn from the terms, history, and policy of that Act, not from

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contrary position were all handed down before the passage of the Wunderlich legislation. In cases decided subsequent to its enactment, this court has not hesitated to reexamine administrative determinations upholding the contractor, and to upset them if the standards for review set forth in the statute call upon us to conclude that the decision below should not stand * * *. [Citations omitted.]

The legislative history of the Wunderlich Act confirms the position, implicit in the statutory language, that administrative rulings against the Government are not wholly free from judicial review. The Comptroller General had long asserted authority to examine such determinations and to deny payment on the basis of illegality. When the Supreme Court held, in *United States v. Wunderlich*, 342 U.S. 98 (1951), that decisions under the Disputes Clause were final unless fraud was alleged and proved, the Comptroller General conceded that, as a result, his powers of review had been eliminated. See Hearings on S. 2487 Before the Subcommittee on Finality Clauses in Government Contracts of the Senate Committee on the Judiciary, 82d Cong., 2d sess. 4-13 (1952).

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[7] (Continued)
policies speculatively drawn from the contract clauses which are themselves governed by the statute. We read the statements of commentators (cited by plaintiff), saying or implying that only the contractor may "appeal" from an adverse decision, as either referring to appeals within the agency or as suggesting the practical unlikelihood that the Government will (or will be able to) obtain judicial review as a regular matter of course.

One of the major reasons for the passage of the new Act was to assure to the General Accounting Office a limited right of scrutiny comparable to (though perhaps not precisely the same as) that given to the courts.[8] Though his power to utilize all of the Wunderlich standards has been questioned by some, the Comptroller General has asserted, since the enactment of the statute, the same authority as the courts to disallow payment of a contractor's claims notwithstanding agency decisions in the contractor's favor. See, e.g., 35 Dec. Comp. Gen'l 63, 70 (1955), and GAO decisions referred to in the articles cited in footnote 8, *supra*. Where the issue is one of law (e.g., interpretation of the contract), this court has upheld exercises of that power. See *Associated Traders, Inc. v. United States*, *supra*, 144 Ct. Cl. at 749, 750, 169 F. Supp. at 505, 506-07 (1959); *Northrop Aircraft Inc. v. United States*, *supra*, 130 Ct. Cl. at 629-33, 127 F. Supp. at 599-601 (1955).[9] The present

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[8] See 1954 U.S. Code Cong. & Adm'n News 2191, 2196-97; Note, 70 Harv. L. Rev. 350, 358-59 (1956); Shedd, *Disputes and Appeals; The Armed Services Board of Contract Appeals*, 29 Law and Contemp. Prob. 39, 81-82 (1964); Spector, *Is it "Bianchi's Ghost"—Or "Much Ado About Nothing?"* 29 Law and Contemp. Prob. 87, 108-11 (1964); Schultz, *Wunderlich Revisted: New Limits on Judicial Review of Administrative Determination of Government Contract Disputes*, 29 Law Contemp. Prob. 115, 117, 132-33 (1964).

[9] This and other courts have sometimes overturned Comptroller General's reversals of administrative

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case does not, of course, require us to define the full scope of the Comptroller General's authority, but the fact that he undoubtedly has some role under the Wunderlich Act helps to demonstrate that the statute applies to administrative decisions favoring the contractor, as well as those which are adverse. A favorable determination is not removed from all examination by the courts. Issues of law, at the very least, are still open.

We think that the Congress, when it was considering the Wunderlich Act, expressly recognized the jurisdiction of the General Accounting Office to review Disputes clause decisions on questions of fact or law and, moreover, deemed the exercise of such jurisdiction necessary and desirable. This is best demonstrated by a review of the legislative history of the act.

The first section of the Wunderlich Act, 41 U.S.C. 321, provides that:

> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of

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decisions sustaining contractors, but the cases have involved errors of law or the absence of circumstances sufficient to invalidate the administrative determination under the prevailing standards. In other words, the Comptroller General has been held wrong in the particular circumstances, not devoid of power over such favorable decisions. See, e.g., *McShain Co. v. United States*, 83 Ct. Cl. 405, 409-10 (1936); *Albina Marine Iron Works, Inc. v. United States*, 79 Ct. Cl. 714, 719-20 (1934).

> any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

The Wunderlich Act does *not* provide that administrative decisions on disputed questions are final and conclusive unless determined by a "court of competent jurisdiction" to have been fraudulent or capricious or arbitrary, etc. On the contrary, the act merely provides that "any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary," etc. The Wunderlich Act does not identify the forum in which it is to be determined that a decision is fraudulent or capricious, etc., and the legislative history of the act shows that the Congress deliberately omitted naming the forum.

As H. Rept. No. 1380, 83d Cong., points out, the Senate during the 82d Congress passed S. 2487 but it was too late in the session for the House to act. Section 1 of S. 2487, as passed by the Senate, provided:

> That no provision of any contract entered into by the United States, relating to the finality or conclusiveness, in a dispute involving a question arising under such contract, of any decision of an administrative official, representative, or board, shall be pleaded as limiting judicial review of any such decision to cases in

> which fraud by such official, representative, or board is alleged; and any such provision shall be void with respect to any such decision which the *General Accounting Office or a court, having jurisdiction*, finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by realible, probative, and substantial evidence. [Italic supplied.]

Senate Rept. No. 1670, 82d Cong., 2d sess., which accompanied S. 2487, stated:

> The committee wishes to point out with respect to the language contained in the bill, "in the General Accounting Office or a court having jurisdiction," that it is not intended to narrow or restrict or change in any way the present jurisdiction of the General Accounting Office, either in the course of a settlement or upon audit; that the language in question is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.
>
> It should also be pointed out that in speaking of a court "having jurisdiction" the committee intends to negative both the possibility of a construction which would give basis for a contention that this bill itself was granting a court jurisdiction to review Government contracts; and also any construction that would give a basis for a collateral attack on such contracts in a court not having direct jurisdiction of the contract itself.

On June 8, 1953, during the 1st session of the 83d Congress the Senate passed S. 24 which contained the identical language of S. 2487. S. Rept. No. 32 which accompanied S. 24 contained the same statements as those quoted above from S. Rept. No. 1670.

Thereafter, in the 83d Congress, 2d session, S. 24 was passed and became the Wunderlich Act in its present form. This S. 24 omitted the phraseology "the General Accounting Office or a court, having jurisdiction" because of the objections thereto by the Department of Defense and various defense industries. See H. Rep. No. 1380. The present Wunderlich Act language was based on an amendment to the various bills then being considered which was submitted by our Office in the form of a substitute by letter dated December 30, 1953. See H. Rept. No. 1380. The omission of the words "General Accounting Office or a court having jurisdiction" in the substitute draft was predicated upon the conclusion that specific mention of our Office or the courts in the act was unnecessary to confer review jurisdiction either upon our Office or upon the courts. In this connection it should be noted that our Office had never asked for authority it did not have prior to the decision in the *Wunderlich* case. Prior to that decision we had consistently taken the position that Disputes clause decisions on questions of fact or law were not binding on our Office if under settled judicial precedents they would not be binding upon the courts, and that we had full authority to review such decisions under the same standards applied by the courts. Since, as indicated in S. Rept. No. 1670, the specific mention of our Office or the courts in S. 2487 was not intended to change the existing authority of either forum or to grant new jurisdiction to either forum, our Office did not feel that the omission of such mention would or could change the result in S. 24 as finally adopted. Representatives of our Office testified to

that effect on January 21, 1954, during the hearings on the substitute bill S. 24. See pages 36-42, Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 83d Cong., 1st and 2d sessions, on H.R. 1839, S. 24, H.R. 3634, and H.R. 6946. Moreover, H. Rept. No. 1380, which accompanied the bill which became law specifically states that:

> * * * The proposed legislation also prescribes fair and uniform standards for the judicial review of such administrative decisions in the light of reasonable requirements of the various Government departments and agencies, *of the General Accounting Office* and of Government contractors * * *.
>
> * * * *
>
> The proposed legislation, as amended, will not add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit, and the language used is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.
>
> The elimination of the specific mention of the General Accounting Office from the provisions of the bill as amended should not be construed as taking away any of the jurisdiction of that Office. *It is intended that the General Accounting Office, as was its practice,* in reviewing a contract and change orders for the purpose of payment, *shall apply the standards of review that are granted to the courts under this bill.* At the same time there is no

> intention of setting up the General Accounting Office as a "court of claims." *Nor should the elimination of the specific mention of the General Accounting Office in the bill be construed as limiting its review to the fraudulent intent standard prescribed by the Wunderlich decision.* [Italic supplied.]

Finally, see 100 Congressional Record 5510; 5717-5718 (April 26, 1954; April 29, 1954) where the floor leaders on the legislation assured the members of the Senate and the House that the bill was satisfactory to the General Accounting Office. Senator McCarran, who authored the Senate bill, also stated:

> * * * It is my understanding the Department of Justice takes the view that the House language will accomplish the same purpose as the Senate language [i.e. S. 24 which passed on June 8, 1953 and which was identical to S. 2487]. It is my further understanding that the Comptroller General of the United States has expressed complete satisfaction with the House language, and has declared that in his opinion it will accomplish the purposes sought to be served by the Senate language.
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> * * * *
>
> Mr. CASE. Can the Senator from Nevada tell us how the assurance was given that the bill was satisfactory to the General Accounting Office? Would the Senator kindly restate the assurance which he voiced with reference to the opinion of the General Accounting Office?
>
> Mr. McCARRAN. The General Accounting Office is satisfied with the language of the House bill. It has assured me of that.
>
> Mr. CASE. The Comptroller General has assured the Senator from Nevada on that point?

Mr. McCARRAN. That is correct; *otherwise I would not care to go along.*

* * * *

Mr. THYE. As I understand, the bill was passed by the Senate, and a similar bill was passed by the House. The only question involved is a modification of the language in the Senate bill, *and the two bills agree in their effect*, so to speak?

Mr. McCARRAN. That is correct.

Mr. THYE. *There is nothing else of a legislative nature involved?*

Mr. McCARRAN. That is correct. [Italic supplied.]

It is thus apparent that in drafting S. 24, as finally enacted, the Congress intentionally refrained from mentioning both our Office and the courts on the assumption that is was unnecessary to do so since both forums already possessed the requisite authority and jurisdiction to review administrative decisions on questions of fact or law. The "standards of review that are granted to the courts" under the Wunderlich Act, and which H. Rept. No. 1380 makes clear are to be exercised by the General Accounting Office, are standards relating solely to decisions on questions of *fact* (i.e. fraud, arbitrariness, capriciousness, not supported by substantial evidence, etc.). Moreover, as that report makes clear, the General Accounting Office is not limited in its review to the fraudulent intent standard prescribed by *United States v. Wunderlich*, 342 U.S. 98. This fraud standard, it should be noted, was, and still is, one of the standards of review applicable to decisions on questions of *fact*. Thus, the conclusion is inescapable that the Congress recognized that our Office did have jurisdiction to review these matters both prior and subsequent to the *Wunderlich* decision, and that the Wunderlich Act was not intended

to affect such jurisdiction. It is equally clear from the legislative history that in exercising such jurisdiction after passage of the act, it was the congressional intent that our Office would apply the same standards in reviewing factual determinations that the courts would apply under the act. In this connection, see also the report prepared for the Select Committee on Small Business, United States Senate, entitled "Operation and Effectiveness of Government Boards of Contract Appeals" by Professor Harold C. Petrowitz, 89th Cong., 2d sess, July 28, 1966, page 29.

The minimal bounds of review by our Office of administrative Disputes clause decisions must be drawn from the terms, history and policy of the Wunderlich Act. "not from the contract clauses which are themselves governed by the statute." *C.J. Langenfelder & Son, Inc. v. United States, supra*. Accordingly, it must be concluded that the language regarding a "court of competent jurisdiction" appearing in the Disputes clause of the S&E contract can have no effect upon the authority of the General Accounting Office to review and question the Examiner's and Commission's findings on questions of fact in this case, since such language goes beyond not only the literal and governing provisions of the Wunderlich Act, but the clear legislative history of what those provisions are intended to mean as well.

Experience in our office has shown that erroneous decisions in favor of contractors have sometimes been made by administrative officials under standard Disputes clauses. Contractors, of course, have a right to judicial review which serves to protect them from administrative decisions that fail to meet the minimum standards set forth in the Wunderlich Act. But how is the Government to be protected from erroneous adverse decisions which fail to meet the Wunderlich standards? As the *Langenfelder* case indicates, Disputes clause decisions favorable

to contractors are reviewable by the courts; however, the crucial question here, which S&E overlooks, is not whether the Government has the *right* to judicial review of adverse decisions but in what manner and under what procedure can the Government get to the courts for such a review? Since Disputes clause decisions are those of the head of the department or agency involved appeal by the agency would be highly unlikely. The Court of Claims recognized this unlikelihood in *Langenfelder*. See footnote 7 of that decision quoted above. Moreover, in view of the lack of judicial pronouncement on the point, there may be a question whether the Government has standing to file an appeal directly with the courts challenging an adverse decision by one of its agencies under a Disputes clause. In that connection, see report prepared for the Select Committee on Small Business, U.S. Senate, 89th Cong., 2d sess., entitled "operation and Effectiveness of Government Boards of Contract Appeals," by Professor Harold C. Petrowitz, July 28, 1966, pages 29-30. It is obvious, therefore, that unless this Office raises an objection, either upon its own initiative or upon a submission by an accountable officer having responsibility for approval or payment of the award, and directs the department head not to make payment under a particular decision, adverse decisions that fail to meet the Wunderlich standards will go undetected and unremedied. Thus, while S&E contends that the Comptroller General should not assume jurisdiction to consider this case, "thereby allowing the appeal to proceed through the proper and ordinary disputes Channel," such contention ignores the obvious fact that where, as here, the disputes procedure has been exhausted in the contracting agency, there would be no further channel open to remedy an erroneous Disputes clause decision against the Government's interest unless our Office exercised its traditional jurisdiction to question such a decision.

The argument has been made that the Government is not in need of the protection afforded by judicial review since the decisions to be reviewed are rendered by Government officials. We think that such an argument overlooks the obvious fact that Government officials can err in favor of contractors as well as in favor of the Government. The argument also ignores the fact that contract disputes hearings are adversary proceedings in which the hearing tribunal should be impartial and independent. A tribunal's decision must meet the high standards of finality prescribed in the Wunderlich Act. To view these tribunals purely as agents of the Government would reduce them to a subservient status with the implication that they are not in a position to exercise independent, fair and impartial judgment. The contract appeal tribunals have become institutionalized and have a long and honorable history of fair and impartial adjudication of disputes. Like any tribunal, judicial or administrative, they may commit errors of law or fact but no responsible critic today would contend that they are mere creatures of a department or agency and that in the hearing of a case they represent the department's or agency's interest. At the same time, it must not be overlooked that these dispute-determining tribunals or officers are created solely by administrative action, have no statutory powers, and can exercise only such authority as is delegated to them by the agency or department heads who create them. In the end, their power can be no greater than that of their creator and their actions can have no greater effect than would the action of the agency head. Since the primary objective of the Budget and Accounting Act, 1921, was the creation of an authority outside the Executive, responsible only to the Congress, to check and prevent administrative action contrary to statutory fiscal limitations imposed by the Congress, it seems imperative, especially in view of the billions of dollars annually expended under Federal con-

tracts, that our Office take the action needed to protect the Government's interest whenever administrative Disputes clause decisions are brought to our attention which, in our opinion, fail to meet the finality standards of the Wunderlich Act. In that connection, the duty of our Office was spelled out long ago by the Court of Claims in *Longwill v. United States*, 17 Ct. Cl. 288 (1881) and *Charles v. United States*, 19 Ct. Cl. 316 (1884). The court, in the latter case, stated:

> When, in the course of the examination of accounts in the Departments, suspicions are aroused or doubts are entertained as to the validity of the demands of claimants, the parties may be sent to this court to prove their cases under the rules and forms of law, upon legal and competent evidence, or their demands may be rejected altogether, leaving the claimants to prosecute them here upon their own voluntary petitions, if they so desire. That is the main protection which the accounting officers can secure for themselves and for the Government in the case of claims of doubtful validity in fact or in law, and especially of claims as to which there is a reasonable suspicion of fraud, irregularity, or error.

While it is recognized that the *Longwill* and *Charles* cases did not involve claims presented under the Disputes clause procedure, nevertheless, the court's statement on the duty of this Office as to the action to be taken when doubtful claims are brought to our attention is as sound today as it was then, especially when it is remembered that, by act of the Congress, Disputes clause decisions on questions of law are not final and that decisions on questions of fact are final only if they meet the Wunderlich Act standards of review.

In regard to S&E's assertion that the exercise of review functions in this case would make our Office another "Court of Claims" it need only be noted that, while our decision making function is at least quasi-judicial, such a result is neither intended nor possible. The Court of Claims, like any duly constituted court, has the authority and power to render decisions and judgments which are binding and conclusive upon both parties to a suit properly before it. The General Accounting Office is not a court and its decisions under the Budget and Accounting Act, 1921, have no binding effect upon private parties or in judicial proceedings. Such parties have always had the right to pursue any judicial remedies which may be available to them regardless of any previous decisions rendered by the Comptroller General. This right to a judicial remedy exists whether the claim which has previously been denied by the General Accounting Office is one arising outside the Disputes clause or under the Disputes clause. Our function under the Wunderlich Act therefore is not that of another "Court of Claims" which has power to conclusively bind the contractor as well as the Government. Rather, as the Congress intended, our role under the Wunderlich Act is precisely what it has always been even before passage of the act—a role, as spelled out in the *Longwill* and *Charles* cases, *supra*, which, through intervention, makes it possible for the Government to receive the protection afforded by a review in the Court of Claims or any other court having jurisdiction.

Contrary to the assertion in S&E's brief of July 20, 1965, our Office has exercised its jurisdiction to review administrative Disputes clause decisions on questions of fact on a number of occasions. For example, see 43 Comp. Gen. 1; 35 *id.* 512; B-142040, August 27, 1962; 45 Comp. Gen. 693; B-144847, February 14, 1961. See also *McShain Co. v. United States*, 83 Ct Cl. 405 and

Albina Marine Iron Works, Inc. v. United States, 79 Ct. Cl. 714 which are cited in *C.J. Langenfelder, Inc. v. United States*, footnote 9, *supra*. Both *McShain* and *Albina Marine Iron Works* involved reversals by our Office of administrative decisions on questions of fact. In explaining its subsequent overruling of our decisions in those two cases the Court of Claims in *Langenfelder* stated: "In other words, the Comptroller General has been held wrong in the particular circumstances, not devoid of all power over such favorable decisions."

In view of these considerations, we think that action by our Office in this case need not be predicated upon, or circumscribed by, a "request" for our "review of, or concurrence in" the decision reached by the Hearing Examiner as reviewed and modified by the Commission. Nor, for that matter, as indicated above, will our decision be limited to the three issues raised by you with respect to the voucher. Your request for decision brings into issue nearly all of the more fundamental questions decided by the Hearing Examiner, but even if it did not, our responsibility under law would not be discharged were we to ignore a questionable claim allowance once brought to our attention.

We realize, of course, that the scope of our review in this case is broad and far reaching. In view of the fact that our decision may give rise to further ligitation entailing further effort and expense to both parties in the dispute, our conclusions in this case were not reached lightly. We recognize that due regard must be given to the Hearing Examiner's opportunity to judge the credibility of the witnesses who testified at the hearing. This factor was carefully considered by our Office. However, upon comparison of the testimony of various witnesses from both sides, as recorded in the hearing transcript, with the documentary evidence (e.g. the daily logs

of the work, minutes of the weekly meetings, correspondence between the parties, progress pictures and official weather data), we have concluded that any possible effect of the Examiner's opportunity to judge the credibility of witnesses was more than outweighed by the inconsistencies and contradictions revealed by our comparison. Our review of the record reveals that these last mentioned documents directly contradict the testimony of various S&E witnesses during the hearing in several vital and controlling areas of the issues presented. It is important to note in that connection, that the documentary evidence referred to was prepared or compiled contemporaneously with the events described therein and contemporaneously with the construction work as it progressed.

It is contended by S&E's Counsel that our Office does not have the facilities to conduct administrative hearings in Disputes clause cases. It is noted, however, that under the rule set forth in the *Bianchi* case, *supra*, the review of a departmental decision on a question of fact arising under a Disputes clause must, under the Wunderlich Act, be confined to consideration of the record before the department and no new evidence may be received on such questions. Thus, even if we were equipped to conduct hearings and wished to grant a *de novo* review on this case, the *Bianchi* rule would not permit it. It should also be noted that S&E was not precluded from presenting any legal arguments pertaining to this case that it wished to submit, as fully as it could have done in a judicial review. S&E availed itself of this opportunity and submitted legal briefs to our Office by letters dated May 15, August 17, September 17, 1964, June 1, 1965, and July 20, 1966. The contracting officer's attorney also submitted several legal briefs. All of these briefs were carefully considered. It might also be mentioned that the S&E June 1, 1965, and July 20,

1966, briefs are indicative of the seriousness with which we view this case since these briefs are in response to a proposed draft of decision by this Office, and its release for comment to the interested parties is a procedure normally not followed in this type of case. In view of the voluminous record, and also the complexities of the issues involved, together with the fact that many factual as well as legal questions are involved, we felt that we could do no less than offer it for comments or objections. The draft document, contrary to S&E's assertion, is not a redetermination of the facts but a review of the record before the Hearing Examiner to determine whether his findings, as modified by the Commission, are entitled to finality under the Wunderlich Act standards.

The hearing before the Hearing Examiner was conducted over a period of 13 days in Idaho Falls, Idaho, and in Washington, D.C., during the months of December 1962 and January 1963. Extensive testimony was presented by witnesses from both sides—the hearing transcript ran to a length of 2442 pages. Numerous documents and data were introduced into evidence—25 by the Government, designated as 1 through 25, and 30 by S&E, designated as A through DD. In addition, 5 exhibits were received in evidence which were designated as exhibits of the Hearing Examiner. The exhibits on both sides were varied and complete, covering nearly every aspect of the issues involved. They included, among other things, periodic photographs of construction progress, minutes of weekly construction meetings, daily logs of the work, Department of Commerce local climatological data, contract drawings and correspondence between the parties.

Because of the import of the decision of the United States Supreme Court in *United States v. Carlo Bianchi and Company, Inc.*, 373 U.S. 709 (1963), a few com-

ments on the nature of the evidence in the case transmitted to this Office, and upon which our review was based, appear warranted. In the *Bianchi* case, the Supreme Court held that, apart from questions of fraud, the review of a departmental decision on a question of fact arising under a Disputes clause must, under the Wunderlich Act, be confined to consideration of the record before the department, and that the reviewing court may not receive new evidence on such questions. See also the recent decisions by the Supreme Court in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 and *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424. At the outset it should be noted that no new evidence, not previously considered by the Hearing Examiner and/or Commission, was considered by our Office in the review of this case. However, a few of the exhibits which were presented in evidence at the hearing were not before us for consideration. They consist of the following: contracting officer's exhibit 7; S&E exhibits B, N, O, and X, and Hearing Examiner exhibits 1, 4 and 5. However, we do not think, for the reasons stated below, that their absence from the record before our Office could affect, in any way, the completeness of our review or the validity of our conclusions.

S&E exhibit B consisted of a scale model of the project which, during the early portion of the hearing, was assembled, piece by piece, by S&E witnesses to illustrate the steps and sequence of construction. The model was built by S&E after completion of the contract for the purposes of the hearing and, in and of itself, has no probative value as evidence of what transpired between the parties during the course of the contract. While the model may have been useful to acquaint a person who was not present at the site during the construction period with the nature, size and elements of the project, other evidence, of more probative value, is

available for that purpose. This other evidence consists of photographs taken at regular intervals during the construction, minutes of weekly meetings, contract drawings and the daily logs of the work. For these reasons and, also, because of the practical difficulties involved in moving the model from the AEC headquarters building to this Office, we did not request submission of the model here.

A large portion of the hearing was devoted to the claim of impossibility of performance. Most of the evidence on this claim consisted of expert testimony based on an analytical system, called the "critical path method," which is used to determine necessary time for construction and which we need not go into here. Contracting officer's exhibit 7, S&E exhibits N and O, and Hearing Examiner's exhibits 1, 4 and 5 are related to the impossibility claim. As the Hearing Examiner recognized, his authority to grant relief on a claim under the Disputes clause must be based on some provision in the contract providing for such relief. See *Utah Construction & Mining Co. v. United States*, 168 Ct. Cl. 522, affirmed on this point 384 U.S. 394. While a claim of impossibility may be set up as a defense in an action for breach of contract, there was no authority under the contract to grant affirmative relief on such a claim. The Examiner rejected S&E's claim for time extensions because of impossibility of performance "as a matter of law." We are in complete agreement with the legal soundness of the Examiner's conclusion in this regard. Since the evidence and exhibits cited above related to a claim not properly presentable under the Disputes clause, they were deemed immaterial for consideration in our review.

S&E exhibit X was an analysis prepared by S&E showing the cost of providing 64 carpenters to man the job which the Government witness, Commander Anderson, who was the Contracting Officer's Representative at

the site, had earlier testified was the proper size force for the project. When this exhibit was offered in evidence, the attorney for the contracting officer objected on the ground that it was irrelevant. The issue of the number of carpenters that should have been used on the job will be discussed later. In any event, however, the data and cost figures contained in exhibit X were fully disclosed and discussed by Mr. Elder in his testimony during the hearing (pp. 2388-2391 of the Transcript). For these reasons, it is not felt that the physical presence of exhibit X is necessary for consideration in our review.

Our review of the Examiner's decision, as modified by the Commission, has been made on the basis of the entire record, with the exceptions noted above. The phrase "substantial evidence" has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Edison Company v. National Labor Relations Board*, 305 U.S. 197, 229. In enacting the Wunderlich Act it is clear that Congress intended to adopt the *Edison Company* case definition of "substantial evidence." See H. Rep. No. 1380, page 4. However, in applying the "reasonable mind" criterion of the *Edison Company* case it has been held that the record made before the deciding official or body must be considered as a whole. See *Lee Hoffman v. United States*, 166 Ct. Cl. 39, 51, where the court said:

> Defendant urges that the criterion set forth in *Bateson Co. v. United States*, 149 Ct. Cl. 514, 518 (1960) that substantial evidence means "such evidence as might convince a reasonable man, to support the conclusion reached by the agency officials," is fully met in this case. Even were we to assume that there is some evidence which, standing alone, might convince a resonable man to support the

Board's conclusion, this, in and of itself would not be sufficient here. As we stated, in *Williams v. United States*, 130 Ct. Cl. 435, 441, 127 F. Supp. 617, 619, *cert. denied*, 349 U.S. 938 (1955):

> "The fact that there is evidence, considered of and by itself, to support the administrative decision is not sufficient where there is opposing evidence so substantial in character as to detract from its weight and render it less than substantial on the record as a whole."

For other cases in accord with the above ruling see *United States v. Hamden Co-operative Creamery Company Inc.*, 185 F. Supp. 541, affirmed 297 F.2d 130; *Rheem Manufacturing Company v. United States*, 153 Ct. Cl. 465; *River Construction Corporation v. United States*, 159 Ct. Cl. 254; *Fehlhaber Corporation v. United States*, 138 Ct. Cl. 571, *cert. denied* 355 U.S. 877; *Fox Valley Engineering, Inc. v. United States*, 151 Ct. Cl. 288; and *Russel H. Williams, et al. v. United States*, 130 Ct. Cl. 435. In the last cited case the Court of Claims stated (pp. 440, 441):

> We are satisfied from the evidence and have found as a fact that the decision of the head of the department was not supported by substantial evidence. In reaching this conclusion we have considered the evidence on both sides in order to determine whether it appears that the evidence in support of the administrative decision can fairly be said to be substantial in the face of opposing evidence. See *Willapoint Oysters v. Ewing*, 174 F.2d 676, certiorari denied 338, U.S. 860. In a recent decision by the Supreme Court, *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S.

474, 487, the Court made the following statement with respect to the rule relating to substantiality of evidence to support an administrative decision:

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation [Administrative Procedures Act and Taft-Hartley Act] definitively precludes such a theory of review and bars its practice. The substantiallty of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record."

The fact that there is evidence, considered of and by itself, to support the administrative decision is not sufficient *where there is opposing evidence so substantial in character as to detract from its weight and render it less than substantial on the record as a whole.*

As we view the evidence, it is difficult to see how it could be said that there was substantial evidence to support the decision made by the contracting officer and the head of the department in the face of the opposing evidence * * * [Italic supplied.]

See, also, the *Fehlhaber Corporation* case, *supra*, at page 578, where the Court of Claims observed:

In this light, the decision of the Corps of Engineers Claims and Appeals Board is not

> supported by substantial evidence and is in fact contrary to the overwhelming weight of the evidence as the ensuing discussion herein will point out * * *

Compare the statement in an opinion of the Trial Commissioner, adopted by the Court of Claims in a *Per Curiam* opinion, in the *Fox Valley Engineering, Inc.* case *supra*, (p. 241) that a decision of the Armed Services Board of Contract Appeals was "grossly erroneous, and is not substantially supported by the credible and probative evidence."

In our considered opinion, for the reasons set forth hereafter, the decision rendered by the Hearing Examiner, as modified by the Commission, fails in several vital respects to meet the standards set forth in the Wunderlich Act as prerequisite to conferring finality upon such decision. With respect to those claims submitted by S&E which involve questions of fact, we think that the Examiner's decision is not supported by substantial evidence.

We also think the Examiner's decision contained serious errors of law, as will be noted hereinafter.

In regard to the evidence relied upon by the Examiner in support of his decision, we believe, to borrow the words of the Court of Claims in the *Williams* case, *supra*, that "there is opposing evidence so substantial in character as to detract from its weight and render it less than substantial on the record as a whole." To put it another way, we do not believe that the evidence in support of the Examiner's conclusions when considered together with the other evidence of record, is "such relevant evidence as a reasonable mind might accept as adequate to support" such conclusions. It is on the basis of these criteria that we have reviewed the Examiner's decision to determine whether it is supported by substantial evidence. Accordingly, when S&E's individual claims are

discussed hereinafter and we conclude that the Examiner's findings on factual questions are not supported by "substantial evidence" our conclusions result from application of the above criteria, as laid down in the *Edison Company* and *Williams* cases. We cannot help but feel that in reaching his decision, the Examiner either ignored, overlooked, or failed to give proper weight to the vast amount of uncontroverted evidence introduced by the Government in the form of testimony, official weather data, daily logs of the construction work kept by both parties, official minutes of weekly construction meetings, and correspondence between the parties on the various issues which arose from time to time. The latter four categories of evidence, in our view, have especially significant probative value since these documents were compiled or composed contemporaneously with the construction work as it progressed and they were not challendged by S&E during the hearing as being inaccurate, misleading or erroneous. As noted earlier, the testimony of S&E's witnesses is contradicted by this unchallenged documentary evidence in several vital respects. It is also our belief, as will be demonstrated hereafter, that the Examiner failed to adequately evaluate the evidence introduced by S&E, since a close inspection and analysis of that evidence indicates much of it is general and imprecise in nature and in some important instances is internally contradictory and inconsistent.

APPENDIX D

1. The Act of May 11, 1954, 68 Stat. 81 (The Wunderlich Act), 41 U.S.C. 321-322) provides:

> §321. *Limitation on pleading contract-provisions relating to finality; standards of review.*
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fradulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> §322. *Contract-provisions making decisions final on questions of law.*
>
> No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

2. The contract provided in pertinent part:

> "6. *Disputes*
>
> "(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is

not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission or its duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

"(b) This 'Disputes' Clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.